No. 93-6892-CFY
Status: GRANTED

Title: Matthew Wayne Tome, Petitioner
v.
United States

Docketed:
November 24, 1993

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Gandert,Joseph

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Nov 24 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Dec 23 1993		Order extending time to file response to petition until January 31, 1994.
5	Jan 31 1994		Brief of respondent United States in opposition filed.
6	Feb 3 1994		DISTRIBUTED. February 18, 1994 (Page 42)
8	Feb 22 1994		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
10	Mar 7 1994		Order extending time to file brief of petitioner on the merits until April 29, 1994.
11	Apr 11 1994		Joint appendix filed.
12	Apr 29 1994		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
13	Apr 29 1994		Brief of petitioner filed.
15	May 25 1994		Order extending time to file brief of respondent on the merits until June 14, 1994.
16	Jun 13 1994		Brief of respondent United States filed.
17	Jun 15 1994		Brief amici curiae of Ohio, et al. filed.
19	Jul 12 1994	X	Reply brief of petitioner filed.
18	Jul 15 1994		CIRCULATED.
20	Jul 20 1994		SET FOR ARGUMENT WEDNESDAY, OCTOBER 5, 1994. (2ND CASE).
21	Jul 29 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Tenth Circuit.
22	Aug 4 1994		Record filed.
		*	Original proceedings U.S. District Court, District of New Mexico (5 SEALED DOCUMENTS) (BOX)
23	Aug 24 1994	X	Supplemental brief of petitioner filed.

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

93-6892

MATTHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORIGINAL

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
P.O. Box 449
Albuquerque, NM 87103
(505) 766-3293
By: Joseph W. Gandert
Attorney for Petitioner

SERVICE TO:

Solicitor General
Department of Justice
Washington, DC 20530

November, 1993

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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME,

Petitioner,

vs.

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Respondent.

DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Joseph W. Gandert, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this Court and counsel for petitioner, Matthew Wayne Tome, and that I personally mailed the petition for certiorari to this Court by depositing the original and nine copies in an envelope addressed to the Clerk of this Court, sealed the envelope, and deposited it in the United States mailbox at the U.S. Post Office at 500 Gold Avenue SW, Albuquerque, New Mexico, at approximately 4:00 p.m. on the 24 day of November, 1993.

Joseph W. Gandert
Attorney for Petitioner

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Matthew Wayne Tome, through his attorney who was appointed pursuant to the Criminal Justice Act, 18 U.S.C. §3006(A), respectfully moves this honorable Court to grant leave to continue to proceed in forma pauperis. In support of this motion, counsel declares under penalty of perjury:

1. The Federal Public Defender Organization for the District of New Mexico is organized pursuant to 18 U.S.C. §3006(h)(2)(A).

2. Pursuant to the Criminal Justice Act, 18 U.S.C. §3006(A), the United States Magistrate for the District of New Mexico appointed the Federal Public Defender Organization for the District of New Mexico on June 26, 1991, to represent petitioner, Matthew Wayne Tome, on federal criminal charges brought against him before the United States District Court.

3. Following appeal to the United States Court of Appeals for the Tenth Circuit, that court appointed the Office of the Federal Public Defender on September 11, 1992, to represent petitioner in connection with the appeal of this conviction. One of the duties of counsel appointed in the Tenth Circuit is to represent petitioner in a petition for a writ of certiorari if petitioner so requests.

4. Pursuant to Tenth Circuit Rule 24.1, a party who has been permitted to proceed in an action in District Court in forma pauperis may proceed on appeal without further authorization unless the District Court certifies otherwise.

5. Following the issuance of the Tenth Circuit's opinion in this case, petitioner has requested that his appointed Federal Public Defender present this petition to this Court.

6. As far as counsel is aware, petitioner continues to be indigent.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
P.O. Box 449
Albuquerque, NM 87103
(505) 766-3293

Joseph W. Gandert
Attorney for Petitioner

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER EVIDENCE OF A PRIOR CONSISTENT STATEMENT IS INADMISSIBLE UNDER FED. R. EVID. 801(d)(1)(B) TO REBUT A PRE-EXISTING MOTIVE TO FABRICATE.

II. WHETHER THE ADMISSION OF TESTIMONY CONCERNING A CHILD'S PRIOR STATEMENTS VIOLATES FED. R. EVID. 801(d)(1)(B) WHEN THE CHILD IS EFFECTIVELY UNAVAILABLE FOR CROSS-EXAMINATION CONCERNING THOSE STATEMENTS.

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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Matthew Wayne Tome, respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, case number 92-2104, is attached in the Appendix.

JURISDICTION

The Tenth Circuit Court of Appeals' judgment that is sought to be reviewed was filed and entered on August 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Pursuant to Supreme Court Rule 13.1 and 28 U.S.C. §2101(c), this petition is timely if filed by November 24, 1993.

FEDERAL RULE OF EVIDENCE

The provision of the Federal Rules of Evidence involved in this case is the following:

Fed. R. Evid. 801(d)(1)(B), which provides:

> (d) Statements which are not hearsay. A statement is not hearsay if--
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, ...

STATEMENT OF THE CASE

On June 4, 1991, Matthew Wayne Tome was charged in a one-count indictment with engaging in sexual acts with a female Indian child under the age of twelve years, in violation of 18 U.S.C. §§1153, 2241(c), and 2245(2)(A)(B). Tome received a jury trial, which was held from February 24, 1992, through March 2, 1992. On March 3, 1992, the jury returned a guilty verdict. On May 15, 1992, the District Court sentenced Tome to a term of imprisonment of 144 months.

The accusations giving rise to the charges against Matthew Tome in this case were raised during the course of a long and bitter custody dispute between Tome and his ex-wife, Beverly Padilla. The couple were divorced in September, 1988, by decree of the Navajo Tribal Court. The court awarded joint custody of their only child, Andrea, born June 18, 1985, to both parents with primary physical custody to Tome.

Between September, 1988, and May, 1989, Tome had custody of Andrea during weekdays; Padilla had custody on the weekends. During this time, Andrea attended a head start program. Tome and Padilla alternated custody of Andrea every two weeks during the summer of 1989. Andrea was with her mother from June 16, 1989, through June 30, 1989.

In mid-1989, Padilla applied to the Navajo Tribal Court to modify the custody order concerning Andrea to give her primary custody. Following a hearing on August 24, 1989, the court denied Padilla's petition for a change of custody. Tome

maintained primary custody of Andrea during the 1989-90 school year; Padilla received custody on weekends and throughout the summer of 1990.

The summer of 1990 represented the longest continuous time period in which Padilla maintained custody of Andrea since the time of the divorce. By this time, Padilla had remarried and was residing with her new husband and their infant son in Colorado Springs, Colorado.

A court hearing was scheduled for August 22, 1990, to review custody arrangements concerning Andrea. Padilla did not attend that hearing; she testified at defendant's trial that she mistakenly believed that the hearing was to be held two days later. The tribal court ordered that Tome retain primary custody of Andrea and that Padilla continue to receive visitation.

The government maintained that the offense with which Tome was charged occurred on or about June 18, 1989. At trial, Andrea was the government's first witness. Although she was able to respond to preliminary inquiries, her testimony on direct examination about the alleged abuse consisted almost entirely of supplying the indicated answer to a series of leading questions by government counsel.

On cross-examination, Andrea responded to questions posed by defense counsel about extraneous matters, but failed to respond to nearly all queries concerning the charged offense. She did state her belief that the possible outcome of her court testimony was that her mother would go to jail. The trial court noted that

the child did not respond to even simple questions and that she would sometimes wait 40 or 45 seconds after a question without responding.

The court permitted Lisa Rocha to testify, over defendant's hearsay objection, after listening to her testimony outside the presence of the jury. Rocha was a friend of Padilla's who cared for Andrea in Colorado Springs during the summer of 1990. She testified that on August 22, 1990, she was caring for Andrea, and that Andrea came up to her and said, "Please don't let my mom take my [sic] back to my father." When Rocha asked her "why", she said, "Because I don't want to go back." To Rocha's repeated "why" question, Andrea was said to have responded, "Because my father gets drunk and he thinks I'm his wife."

Rocha did not relate Andrea's statement to Padilla until Sunday, August 26, 1990, when she phoned Padilla and asked her to find out from Andrea what she meant. On the following day, Rocha called Padilla again to find out what had happened. Padilla told her that she had not spoken with Andrea about what Rocha had told her. Shortly thereafter, Padilla called Rocha back and asked her to come over to her apartment to speak with Andrea because Andrea would not speak with her mother. Rocha went over as asked.

Rocha testified that she asked Andrea to explain what she meant by saying that her dad thinks she's his wife. Andrea allegedly told Rocha at that time that her father had sexually abused her. Rocha related what Andrea told her to Padilla.

Padilla testified that Andrea refused to explain to her what she meant by telling Rocha that her father gets drunk and thinks of her as his wife. During Rocha's alleged conversation with Andrea concerning the abuse, Padilla went to another room, from where she was able to overhear only a little of what was said. Padilla was permitted to testify about what she allegedly overheard Andrea tell Rocha about the sexual abuse.

Kae Ecklebarger, who had previously been employed as a social worker with Protective Services, testified that her office first received a report concerning Andrea Tome on August 28, 1990. The following day, she met with Andrea, her mother, and Rocha. Padilla and Rocha informed Ecklebarger of the sexual abuse allegations prior to Ecklebarger's interview with Andrea. Ecklebarger testified that she began her interview with Andrea by asking her if she knew why she was there. Andrea was said to have responded that she was there because of what Matthew [her father] had done to her. Ecklebarger testified in detail about what the child told her concerning the alleged abuse.

Dr. Karen Kuper, a pediatrician, testified that Andrea was referred to her by Kae Ecklebarger because of the sexual abuse allegations. She saw Andrea on two occasions, in September and October of 1990. On the first occasion, she interviewed Andrea in the presence of her mother. Kuper testified about Andrea's specific allegations of sexual abuse by her father which the child demonstrated to her through use of a doll.

Dr. Laura Reich, a pediatrician, testified that she examined Andrea on September 21, 1990, in order to treat her for a rash in the vaginal area which Reich determined to have been unrelated to any sexual abuse. Andrea's mother informed Reich, prior to her examination of Andrea, that Dr. Kuper had recently seen her for possible sexual abuse. Reich testified that Andrea told her that her father had sexually abused her.

Dr. Jean Spiegel, also a pediatrician, testified concerning her physical examination of Andrea. She also was permitted to testify concerning Andrea's account of the alleged sexual abuse.

Matthew Tome took the stand in his own defense and denied ever sexually abusing Andrea. He testified about problems between him and Padilla concerning custody arrangements. Tome stated that Padilla often complained about how he cared for Andrea.

While Tome had custody of Andrea, she lived with him, his sister, Sheba, his brother, and his parents in Mitton Rock, New Mexico. Tome's sister and mother, Sheba and Sadie Tome, both testified that they never saw any indications of sexual abuse while Andrea lived with them and that Andrea had a good relationship with them and with her father.

Samuel Pete, a Navajo Tribal Court Advocate, testified concerning his representation of Tome during divorce and custody proceedings in the Navajo court. In November, 1990, the Navajo Tribe, through the prosecutor's office, filed a dependency action concerning Andrea Tome. Dependency actions are filed in cases

involving allegations of neglect, abandonment, or abuse of a child. A hearing was held on January 24, 1991, at which Pete represented Tome. By tribal court order of February 15, 1991, Beverly Padilla received physical custody of Andrea and Tome was granted visitation rights.

During the course of the tribal court dependency proceedings, Tome took a polygraph examination concerning the allegations of sexual abuse of Andrea. The results indicated that he was truthful in his denials of sexual abuse.

Ida Nakai, an assistant teacher, and Cecilia Atcitty, a teacher's aide, both from the head start preschool program which Andrea attended for two years while in Tome's custody, testified on his behalf. Tome was actively involved in the school as the local parent president. They testified that Andrea Tome was a happy, well-adjusted child during the time she attended their school. Marjorie Owen and Leonard Anthony, who also knew Tome through his active involvement with the head start program, testified that Tome was a truthful person in his dealings with them. Anthony testified that Tome demonstrated commitment to advancing the educational goals of the community and that he was a strong leader. Janice Kavadas, a teacher who had known Tome since his high school days, and Ralph Wegner, Tome's employer for five years, testified that he was a very honest and trustworthy person.

On appeal to the United States Court of Appeals for the Tenth Circuit, Tome challenged inter alia, the trial court's

admission of the testimony of Rocha, Padilla, Ecklebarger, Kuper, Reich, and Spiegel with regard to Andrea's statements about sexual abuse by her father. Tome maintained that none of the child's statements to the six witnesses served to rebut any implied charge by defense counsel that the child's accusations were motivated by a desire to live with her mother because, as both parties agreed, the motive pre-existed the statements. The Tenth Circuit, in its opinion appended hereto as Attachment ("Att.") A, rejected the pre-motive rule and concluded that the testimony of all six witnesses concerning the child's statements was properly admitted as substantive evidence under Fed. R. Evid. 801(d)(1)(B).

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THIS CASE PRESENTS THE IMPORTANT ISSUE OF WHETHER EVIDENCE OF A PRIOR CONSISTENT STATEMENT IS INADMISSIBLE UNDER FED. R. EVID. 801(d)(1)(B) TO REBUT A PRE-EXISTING MOTIVE TO FABRICATE. THERE IS A SHARP CONFLICT AMONG THE CIRCUIT COURTS ON THIS QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

Fed. R. Evid. 801(d)(1)(B) does not address whether a prior consistent statement must antedate the existence of the alleged motive to fabricate. Not surprisingly, the rule has spawned myriad interpretations among the circuit courts of appeal. As the Tenth Circuit noted in its opinion in this case, the question of the admissibility of prior statements which do not precede the existence of the alleged motive to fabricate "has divided the other circuits for years." Att. A at 15. In recent years, the conflict on this issue has intensified.

In rejecting the pre-motive rule and concluding that the prior consistent statement need not precede the alleged motive to fabricate, the Tenth Circuit aligned itself with the Fifth, Eleventh, and D.C. Circuits. See U.S. v. Parry, 649 F.2d 292, 296 (5th Cir. Unit B, June 1981); U.S. v. Farmer, 923 F.2d 1557, 1568 (11th Cir. 1991); U.S. v. Montague, 958 F.2d 1094, 1098 (D.C. Cir. 1992). The Second, Seventh, Eighth, and Ninth Circuits, on the other hand, have held that prior consistent statements should not be admitted under Rule 801(d)(1)(B) if the motive to fabricate antedates the statements. See U.S. v. Simmons, 923 F.2d 934, 943 n.3 (2nd Cir.), cert. denied, -- U.S. --, 111 S.Ct. 2018 (1991) (evidence is admissible under Rule 801(d)(1)(B) to rebut charged motive to fabricate only if

statement pre-existed motive); U.S. v. Lewis, 954 F.2d 1386, 1391 (7th Cir. 1992) (same); U.S. v. Bowman, 798 F.2d 333, 338 (8th Cir.), cert. denied, 479 U.S. 1043 (1987) (better rule requires that prior consistent statement precede motive to fabricate); U.S. v. Smith, 893 F.2d 1573, 1581 (9th Cir. 1990) ("a prior consistent statement is admissible only if it was made before the witness had a motive to fabricate." (citing Breneman v. Kennecott Corp., 799 F.2d 470, 472 (9th Cir. 1986)).

Courts have traditionally exercised great caution in admitting evidence of prior consistent statements. "For nearly 200 years last past, the courts have enforced, except in certain very limited circumstances, a general prohibition against the use of prior consistent statements." U.S. v. Quinto, 582 F.2d 224, 232 (2nd Cir. 1978). Prior to enactment of the federal rules, courts generally admitted evidence of consistent statements only for rehabilitative purposes. Id. at 232-33. Rule 801 permits substantive use of prior consistent statements formerly admitted only for rehabilitative purposes.[1]

In U.S. v. Casoni, 950 F.2d 893, 905-906 (3rd Cir. 1991), the court pointed out that Rule 801(d)(1)(B) is inherently confusing. Rule 801 initially states that hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). In Fed. R. Evid. 801(d)(1)(B),

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[1] The Advisory Committee Note to Rule 801 states, "Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence."

the rule provides a hearsay exception for a statement if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence of motive." As noted in Casoni, however, a statement is not hearsay if it is not offered to prove the truth of the matter asserted. Id. at 905. While the Advisory Committee indicated its intent that prior consistent statements be admitted as substantive evidence, the rule itself contains no such provision. As the court commented in Casoni,

> This still leaves us with a problem concerning the internal logic of the rule itself, which takes a prior consistent statement out of the hearsay category because it is offered only for rehabilitative purposes instead of for the truth of the matter asserted but then inconsistently permits its use to prove the truth of the matters it asserts.

Id. at 905.

A prior consistent statement antedating a motive to fabricate demonstrates that the testimony is reliable despite the motive. A prior consistent statement does not serve to refute a charged motive to fabricate if the declarant's motive was the same at the time of the statement as at the time of trial. Although a statement made after the declarant has a motive to fabricate may be relevant to prove the underlying facts, it is inadmissible under Rule 801(d)(1)(B). In United States v. Harris, 761 F.2d 394 (7th Cir. 1985), the court explained that a prior consistent statement lacks probative value if it was made after the existence of a motive to fabricate:

> [E]vidence which merely shows that the declarant said the same thing at trial as he did on a prior occasion

> is of no probative value to rebut an allegation of recent fabrication when the declarant's motive in making both statements was the same[,] for the simple reason that mere repetition does not imply veracity.

Id. at 399.

In Montague, as in the instant case, the appellant maintained that a prior consistent statement was improperly admitted under Rule 801(d)(1)(B) because the declarant had the same motive for fabrication at the time of the statement as at trial. The statement in question was made by the defendant's former co-defendant subsequent to arrest and prior to leniency discussions. The court of appeals reviewed the varied positions of its sister courts on this question. Noting that strict adherence to the appellant's position would almost totally preclude the admission of a cooperating defendant following arrest, the court ruled that "[t]he fact that a prior consistent statement was made after the appearance of a motive to fabricate does not render it per se outside the terms of Rule 801(d)(1)(B)." Id. at 1099. Judge Wald, while concurring in the result, dissented on the ground that a prior statement should be inadmissible under Rule 801(d)(1)(B) if made during leniency discussions with the government. "The fact that the witness said the same thing, at a time when the same alleged motive was operative, provides no counterweight to the charge that she is saying it now because of that motive." Id. at 1100 (Wald, J. dissenting).

In its decision herein, the Tenth Circuit relied on U.S. v. Payne, 944 F.2d 1458, 1470-72 (9th Cir.), cert. denied, -- U.S. -

-, 112 S.Ct. 1598 (1992), and U.S. v. Miller, 874 F.2d 1255, 1274-75 (9th Cir. 1989). In those cases, the Ninth Circuit upheld admission of prior consistent statements to rebut evidence of inconsistent statements, finding that the alleged motive to fabricate in both cases was speculative. In this case, the child's motive in coming forward with her allegations was anything but speculative.

Both the district court and the Tenth Circuit determined that defense counsel impliedly charged the child with fabricating the allegations of abuse in this case in order to remain with her mother in Colorado. Att. A at 14. Testimony indicated that the child's first remark regarding the abuse was her statement to Rocha, "[p]lease don't let my mom take my [sic] back to my father." When asked to explain, the child said, "[b]ecause I don't want to go back"; she later added, "[b]ecause my father gets drunk and he thinks I'm his wife."

The child made the above statements on August 22, 1990, the same day on which the tribal court upheld the custody decree which called for her return to her father and for him to retain primary custody. The child's initial statement expressly states that she wished to remain with her mother and not return to live with her father. Her motive in coming forward was thus irrefutable. While the child's out-of-court statements might explain the basis for that motive, they could not rebut the existence of the motive. The government's true purpose in offering third party testimony concerning the child's out-of-

court statements was to prove the truth of her accusations against Tome, an impermissible purpose under Fed. R. Evid. 801(d)(1)(B).

The child's statement at the time of her initial allegation of sexual abuse, that she did not wish to return to live with her father, also demonstrates that she was subject to the same motivation at the time of her prior consistent statements as at the time of trial. In fact, the government and the defendant agreed that if there was any alleged fabrication or improper influence or motive, it arose by August 22, 1990, the date when the child first approached Rocha concerning the accusations of abuse. Evidence of statements made on and after that date could not serve to rebut the pre-existing motive to fabricate.

The Tenth Circuit's application of Fed. R. Evid. 801(d)(1)(B) herein is also insupportable because it is based upon inconsistent and self-contradictory reasoning. The court concluded that the defense had charged the child with a motive to fabricate to a degree that opened the door to rebuttal through evidence of prior consistent statements recounted by six witnesses. The court also concluded that because the defendant presented insufficient evidence of the child's ability to fabricate, the existence of the motive to fabricate at the time of the consistent statements should not preclude testimony concerning those statements. Att. A at 19. The court's second conclusion undermines the first. If the child lacks the ability

to act on a motive to fabricate, there is little justification for permitting rebuttal of the motive to fabricate.

This case illustrates the unfairness that may result from improper admission of evidence under 801(d)(1)(B). One after another, witnesses were permitted to repeat a sordid account of Tome's alleged abuse of his daughter. Most of these witnesses were professionals with impressive credentials. While the repetition of the statements was not probative of their truthfulness, the allegations undoubtedly assumed greater plausibility with each well-respected witness who related them. The jury likely overlooked the fact that none of these witnesses had any firsthand knowledge concerning the truth of the accusations they repeated. By admitting the disputed hearsay testimony under 801(d)(1)(B), the court permitted the government to impermissibly bolster the child's testimony.

The danger of liberal admission of evidence of prior consistent statements without adherence to the restrictions imposed by 801(d)(1)(B) was explicated by the court in Allison v. State, 162 So.2d 922 (Fla. 1 DCA 1964):

> [A] witness's testimony could be blown up out of all proportion to its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of the said witness.

Id. at 924. In explaining the rationale for its decision, the court in this case pointed to the fact that the child spontaneously made her initial allegation of abuse. Att. A at

19. While that may be a valid consideration, it hardly supports admission of the testimony of six witnesses recounting the child's account of abuse.

The Tenth Circuit decision in this case establishes a dangerous precedent. This Court should accept certiorari in this case in order to settle the conflict between the circuit courts which is epitomized by this case, and to establish the proper application of Fed. R. Evid. 801(d)(1)(B).

II. THE ADMISSION OF TESTIMONY CONCERNING A CHILD'S PRIOR STATEMENTS VIOLATES FED. R. EVID. 801(d)(1)(B) WHEN THE CHILD IS EFFECTIVELY UNAVAILABLE FOR CROSS-EXAMINATION CONCERNING THOSE STATEMENTS. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE ADDRESSED BY THIS COURT.

Although the government physically produced the child, she was for all intents and purposes, unavailable for cross-examination concerning her prior consistent statements as required by Fed. R. Evid. 801(b)(1)(D). As the prosecutor, Ms. Neda, even stated during the course of trial, "[I]n this case I would say in many instances the child, in effect, has not been available . . ." Ms. Neda also acknowledged the child's "inability to articulate what happened to her because of her age." On direct examination, the child was able to answer virtually no substantive questions concerning the alleged sexual abuse without leading questions from the prosecutor. She did not testify on direct examination about her out-of-court statements. On cross-examination, the child gave no response at all to numerous questions posed by defense counsel, particularly those

that concerned her statements to other prosecution witnesses. As the trial court noted,

> ...[I]ntegrals of time have elapsed between the time that the question is finished until the next question is asked of up to as much as 45 or 50 seconds.
>
> I don't know what the reason for that is of the witness' inability to comprehend. I sense that some questions are in that category, but there are other questions that appear to be rather simple questions, and the witness nevertheless has not responded and has waited for the next question as much as, as I say, 40, 45 seconds, many times 20 seconds, 25 seconds. And I've been timing that with my watch.
>
> I don't know what the significance of that may be except insofar as the application of some of the authorities on hearsay statements, and I suppose that we will be addressing that point sometime later in the trial, whether there's an element of, quote, unavailability, end quote, of the witness even though the witness is here.
>
> We have a very unusual situation insofar as this witness is concerned. I would note also on the record that when we started this recess, the witness seemed to be losing concentration. She would look up to the ceiling, would look to the back of the courtroom, she would look over my head, would not in instances face counsel who is inquiring of her.
>
> She twisted and turned, stretched a little bit sometimes. At other time she would put her hand to her mouth and clasp her lips with her hand. We have a very difficult situation here.
>
> In any event, I thought that the record should reflect some of those things. The long pauses between questions, particularly questions that are not answered.

As the Tenth Circuit noted at page 10 of its decision herein, this Court determined in U.S. v. Owens, 484 U.S. 554 (1988), that "[o]rdinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." Id. at 561. The Tenth Circuit concluded that the child in this case willingly responded to defense counsel's queries. Att. A at 13. As illustrated by

the following examples of defense counsel's attempts to question the child about her out-of-court statements, however, Tome's opportunity to cross-examine the child about her prior statements was a mere formalism.

> Q . . . The something that Tara [prosecutor's first name] asked you about in court that happened with Matthew, did you talk about that with other people or just with Tara.
>
> A Just with Tara.
>
> Q She's the only person you talked about that with?
>
> A Yes.
>
> * * * * * * * * * * * * * *
>
> Q What you talked about with Tara about Matthew, did you talk about that with a baby-sitter, any babysitter at all?
>
> A No.
>
> * * * * * * * * * * * * * *
>
> Q [W]hat you told Tara about Matthew, whatever it was, did you tell that to any doctor? And you can say yes or no or you don't remember.
>
> A (No audible response.)
>
> Q Do you remember, Andrea?
>
> A No.
>
> * * * * * * * * * * * * * * * * *
>
> Q ***When you talked to Dr. Kuper, do you remember telling her the truth or not the truth, do you remember?
>
> A No.

The child at various points during cross-examination denied having made any of the numerous out-of-court statements testified to by government witnesses, stated she could remember neither

whether she had made some of those statements nor whether she had told the truth, and failed entirely to respond to continued defense counsel queries about the statements. The defendant in this case was convicted without meaningful opportunity to test the veracity of the out-of-court statements of the only witness with firsthand knowledge of the accusations against him.

The impossible situation faced by defense counsel in attempting to cross-examine the child concerning her prior consistent statements greatly exceeds the case in which the witness merely suffers from lack of memory or testifies inconsistently. While the witness in Owens was at least able to affirm that he told the truth at the time of his prior statement, the child in this case was unable to so testify. Both the prosecutor and the trial court agreed that the child must to some degree be considered unavailable. The child's reluctance to respond, although understandable, prevented defendant from exercising the right of cross-examination to which he was entitled under Fed. R. Evid. 801(d)(1)(B).

Other courts have recognized that child witnesses called to testify at trial were effectively unavailable. In United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986), the court concluded that the five-year-old witness "was simply unable to testify meaningfully at trial", id. at 1445, and "was, for all practical purposes, 'unavailable.'" Id. at 1446. In United States v. Spotted War Bonnet, 933 F.2d 1471 (8th Cir.), cert. denied, -- U.S. --, 112 S.Ct. 1187 (1992), the court determined that the

defendant received adequate opportunity to cross-examine the two young victims to protect his confrontation rights. The court noted, however,

> To be sure, simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns. If, for example, a child is so young that she cannot be cross-examined at all, or if she is "simply too young and too frightened to be subjected to a thorough cross-examination[,]" United States v. Dorian, supra, 803 F.2d at 1446, the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause.

Id. at 1474. While these cases did not address witness unavailability for cross-examination under Fed. R. Evid. 801(D)(1)(B), they demonstrate the problem posed by unresponsive young witnesses which in this case prevented Tome from exercising his right to cross-examination about the prior statements recounted by six prosecution witnesses.

This Court should accept certiorari in this case in order to decide this important federal question and to guide the circuit courts in the appropriate application of Fed. R. Evid. 801(d)(1)(B).

CONCLUSION

For the reasons stated above, petitioner Matthew Wayne Tome requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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PUBLISH

FILED
United States Court of Appeals
Tenth Circuit

AUG 26 1993

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 92-2104
MATTHEW WAYNE TOME, Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CR-91-314-SC)

Joseph W. Gandert, Assistant Federal Public Defender, of Albuquerque, New Mexico, for the Defendant-Appellant.

Louis M. Fischer (Don J. Svet, United States Attorney, District of New Mexico, and Tara C. Neda, Assistant United States Attorney, District of New Mexico, with him on the brief), Attorney, Department of Justice, Washington, D.C., for the Plaintiff-Appellee.

Before **ANDERSON**, **HOLLOWAY**, and **TACHA**, Circuit Judges.

TACHA, Circuit Judge.

Matthew Wayne Tome ("Tome"), a Native American residing on the Navajo Indian Reservation in New Mexico, was convicted of aggravated sexual abuse in violation of 18 U.S.C. §§ 1153, 2241(c), and 2245(2)(A)(B). Mr. Tome appeals his conviction, challenging the admission of certain hearsay testimony and the government's use of leading questions. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Background

A.T. is the daughter of the defendant and his ex-wife, Beverly Padilla. A.T. was born on June 18, 1985. Tome and Padilla divorced in September 1988. The Navajo Tribal Court awarded Tome and Padilla joint custody of A.T. but granted Tome primary physical custody. From September 1988 until May 1989, Tome had custody of A.T. on weekdays while Padilla had custody on weekends. Tome and Padilla alternated custody of A.T. every two weeks during the summer of 1989, with Padilla having custody from June 16 to June 30, 1989.

In August 1989, Padilla petitioned the Navajo Tribal Court for primary custody of A.T. The Tribal Court denied the petition but awarded Padilla custody during the summer of 1990. At this time, Padilla had remarried and was living in Colorado. A follow-up custody hearing was scheduled for August 24, 1990. Padilla and A.T., however, did not attend that hearing. Rather, on August 27, 1990, Padilla contacted Colorado authorities with allegations that A.T. had been sexually abused by her father, Tome. On August 22, 1991, a superseding indictment charged Tome with knowingly

engaging is sexual acts with his daughter, an Indian child under the age of twelve, in violation of 18 U.S.C. § 1153, 2241(c) and 2245(2)(A)(B). In a Bill of Particulars filed September 10, 1991, the government alleged that the conduct in question occurred on or about June 18, 1989, when A.T. was four years old. Tome's trial began on February 24, 1992.

The government called A.T. as its first witness. She was six and one-half years old at the time of trial. After the court extensively questioned A.T. concerning her ability to distinguish the truth from a lie, she testified before the jury. On direct examination, her testimony consisted mostly of one and two-word answers. In addition, the trial judge permitted the prosecutor to use leading questions to develop A.T.'s testimony pertaining to the alleged sexual abuse. The prosecutor asked mainly "yes or no" questions and also had A.T. demonstrate details of the abuse by using dolls and having A.T. point to parts of the prosecutor's body. Through these means, A.T. testified that Tome removed her clothes, got on top of her, and put his private place where she goes potty and in her mouth. She further testified that after this happened she went to the bathroom and wiped blood off herself with a tissue.

A.T.'s cross-examination occurred over two days, beginning on a Monday afternoon and resuming the following Wednesday morning. On the first day, defense counsel covered numerous topics all unrelated to the alleged abuse. She first established that A.T. knew the prosecutor on a first-name basis but did not know the judge or any of the defense counsel. She then questioned A.T.

about the difference between living with her father in New Mexico and her mother in Colorado, focusing on the reasons she might have for wanting to live with her mother. A.T.'s responses to these question on the first day were immediate and ranged from single word responses to complete and relatively detailed sentences.

When A.T.'s cross-examination resumed two days later, it was strained. Almost from the start, when defense counsel asked A.T. about any conversations she had had with the prosecutor on Tuesday, A.T. often provided no audible response. Defense counsel then asked A.T. if she missed her mother when staying in New Mexico and asked her what she thought might happen to her or her mother when they went to court. A.T. testified that she did miss her mother and that she thought that she would be returned to her father while her mother went to jail. After a recess, defense counsel asked A.T. whether she had discussed the alleged abuse with anyone besides the prosecutor and, if so, whether she knew the occupations of those persons. A.T. testified to discussing the matter with several physicians and social workers and stated that their jobs were "to help kids." On recross-examination, when A.T. was asked to describe her testimony on direct examination, she answered that it was "the truth." Defense counsel chose not to ask A.T. about the details of the alleged sexual abuse.

The government also produced several witnesses who testified about statements A.T. made to them. The first witness was Lisa Rocha, A.T.'s baby-sitter and a close friend of A.T.'s mother. Rocha testified that, while she was baby-sitting A.T. on August 22, 1990, A.T. spontaneously told her, "Please don't let my mom

take me back to my father." Rocha testified that, when asked why, A.T. remarked that her "father gets drunk and he thinks I'm his wife." Rocha told Padilla about this incident five days later, on August 27, 1990, at which time she and Padilla attempted to question A.T. further about her accusations. When A.T. would not speak with her mother, Padilla left the room. Rocha testified that A.T. said that her father "does nasties to me," which consisted of taking her clothes off, forcing her legs open, and causing a sharp pain in her stomach when he laid on top of her. Finally, Rocha testified that A.T. related going to the bathroom and wiping blood off herself with a tissue.

Next to testify for the prosecution was Dr. Karen Kuper, a pediatrician in Colorado Springs. Kuper testified that Kae Ecklebarger, a Child Protection Service's caseworker, referred A.T. to her office. Kuper examined A.T. on two occasions in September and October 1990. As part of A.T.'s examination, Kuper interviewed her using anatomically correct dolls. Kuper testified that A.T. told her that her father hurt and scared her by putting his fingers and his "thing" in her vagina. When asked what his "thing" was, A.T. pointed to the doll's genital area. Kuper also testified that A.T. had an enlarged vaginal opening and an abnormally thin rim of hymenal tissue, and that these physical characteristics were consistent with vaginal penetration.

The testimony of Dr. Laura Reich, Chief of Pediatrics at the El Pomar Community Health Center in Colorado Springs, followed. Reich examined and interviewed A.T. on September 21, 1990. Reich testified that A.T. said that "her father had put his thing in

her." Reich further testified that A.T.'s hymen was not intact, that her vaginal opening was larger than normal, and that she had an extensive vaginal rash. Reich also testified that A.T.'s physical characteristics were consistent with vaginal penetration.

The government's next witness was Kae Ecklebarger, who was a caseworker in the Colorado Springs Child Protection Services office at the time she interviewed A.T. on August 29, 1990. Ecklebarger testified that A.T. said that her father removed her panties, put her down on the floor, and "put his balls" in her. Ecklebarger stated that A.T. demonstrated intercourse with anatomically correct dolls, attempting to insert the male doll's penis into the female doll and moving the male doll up and down on top of the female doll. Ecklebarger further testified that A.T. stated that her father kissed her on her vaginal area and asked her to touch his penis. Finally, Ecklebarger testified that A.T. said that she wiped blood from herself with a tissue, kept the tissue, and later showed it to her grandmother, saying, "Look what Matthew did to me."

A.T.'s mother, Beverly Padilla, also testified for the government. She stated that she was in the next room when Rocha was talking to A.T. on August 27, 1990. Padilla testified that she heard A.T. tell Rocha about her father pulling her legs apart.

The final witness to relate A.T.'s out-of-court statements was Dr. Jean Spiegel, a pediatrician at the University of New Mexico. Spiegel examined A.T. on September 3, 1991, when A.T. was six years old and almost two years after the abuse allegedly occurred. Spiegel testified that A.T.'s vaginal opening was

abnormally large and that she had very little hymen left. She stated that these physical characteristics were consistent with chronic vaginal penetration. On redirect examination, Spiegel testified that A.T. stated that her father touched her breasts, her "front privates," and "her bottom where her poop comes out."

On March 3, 1992, after Tome testified and presented his own evidence and witnesses, the jury convicted him on all counts. On appeal, Tome alleges the following errors: (1) the admission of alleged hearsay testimony in violation of the Federal Rules of Evidence and the Sixth Amendment's Confrontation Clause; (2) the improper use of leading questions to elicit A.T.'s testimony on direct examination; and (3) cumulative error and a fundamentally unfair trial.

II. A.T.'s Out-of-Court Statements

Tome challenges the testimony of six witnesses concerning A.T.'s out-of-court statements to them: Rocha, Ecklebarger, Padilla, Kuper, Reich, and Spiegel. In our analysis, we address whether the trial court properly admitted the testimony under the Federal Rules of Evidence and, if so, whether that testimony nevertheless violated Tome's rights under the Confrontation Clause.

A. Federal Rules of Evidence

The decision to admit evidence is within the sound discretion of the district court. United States v. Zimmerman, 943 F.2d 1204, 1211 (10th Cir. 1991). We accord heightened deference to the

trial court's hearsay rulings. See United States v. Johnson, 971 F.2d 562, 571 (10th Cir. 1992).

The government proffered the challenged testimony of everyone but Ecklebarger as not hearsay under Fed. R. Evid. 801(d)(1)(B), contending that the defense had implied, during its cross-examination of A.T., that she had fabricated the allegations of abuse in order to live with her mother in Colorado.[1] The government also contended that, even if the proffered testimony were hearsay, it all fell within one of two hearsay exceptions. The government offered the testimony of Doctors Kuper, Reich, and Spiegel under Fed. R. Evid. 803(4) as statements made for the purpose of medical diagnosis or treatment and the testimony of Rocha, Padilla, and Ecklebarger under Rule 803(24)'s "catch-all" exception as having adequate circumstantial guarantees of trustworthiness. We conclude that the testimony of all six witnesses[2] was admissable as not hearsay under Rule 801(d)(1)(B) and therefore do not address the Rule 803 hearsay exceptions.

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[1] Rule 801 defines as hearsay "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The Rule further provides that a witness's prior statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Id. Rule 801(d)(1)(B).

[2] Although the applicability of Rule 801(d)(1)(B) was a recurring evidentiary issue, the government failed to expressly offer Ecklebarger's testimony as nonhearsay under the rule. This court, however, "is not bound by the evidentiary basis relied upon by the trial court for the admission of the challenged evidence." Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1331 (10th Cir. 1984).

Under Rule 801(d)(1)(B), evidence of a witness's prior consistent statement is not hearsay if the witness is subject to cross-examination concerning his prior statement and it is offered to rebut an express or implied charge of recent fabrication or improper motive See United States v. Sutton, 732 F.2d 1483, 1493-94 (10th Cir. 1984), cert. denied, 469 U.S. 1157 (1985). Tome contests the admission of the statements under Rule 801(d)(1)(B) on the grounds that (1) A.T. was not "subject to cross-examination concerning the statement," (2) defense counsel's attempt to cross-examine A.T. did not amount to a charge of recent fabrication or improper motive, and (3) the statements did not fall within the proper scope of the rule because they were made after the declarant had a motive to lie.

(1) Subject to Cross-Examination

We first address Tome's contention that A.T. was not subject to cross-examination as required by the rule because she was unresponsive to certain questions. The Supreme Court addressed Rule 801's cross-examination requirement in United States v. Owens, 484 U.S. 554 (1988), which involved a prison officer who suffered severe memory impairment after he was attacked and beaten with a metal pipe. Id. at 556. The officer identified his assailant to an FBI agent. At the assailant's trial, however, the officer testified that, while he remembered identifying the assailant, he could not now remember seeing his attacker. Id. The court examined the testimony under Rule 801(d)(1)(C), which has the same cross-examination requirement as Rule 801(d)1)(B).

In what it deemed "the more natural" reading of the cross-examination requirement, the Court stated that "[o]rdinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." Id. at 561. The Court then concluded that the witness was subject to cross-examination notwithstanding his forgetfulness because he answered questions regarding his prior statements and the factfinder could evaluate his prior statements in light of his present inability to remember the factual basis underlying them. Id. at 562.

We first note that the Rule 801(d)(1) standard is not identical to that contained in the Sixth Amendment's Confrontation Clause. See United States v. DiCaro, 772 F.2d 1314, 1325 (7th Cir. 1985) (citing Dutton v. Evans, 400 U.S. 74, 86 (1970)), cert. denied, 475 U.S. 1081 (1986). The Confrontation Clause, which we discuss below, protects the accused's right to "an opportunity for effective cross-examination." See Owens, 484 U.S. at 559. In contrast, Rule 801(d)(1) requires that the witness be subject to cross-examination concerning the prior consistent statement only. The Rule does not require cross-examination concerning the events underlying the statement or the matter asserted therein. See 4 David W. Louisell & Christopher B. Mueller, Federal Evidence § 419, at 179-80 (1980).

A.T. testified at trial and answered questions on cross-examination. Over the course of two days, the defense asked A.T. approximately 348 questions on cross-examination, covering nearly fifty-one pages of trial transcript. On the first day, A.T.

answered all of the questions posed to her, all of which were background questions or otherwise not directly related to her allegations of abuse.

Cross-examination on the second day was more difficult. The defense asked about 249 questions, approximately sixty-six of which elicited no audible or discernible response. Defense counsel began by asking A.T. about her meetings with the prosecutor on Tuesday, the day between her first and second days of cross-examination. A.T. acknowledged that she met with the prosecutor for a short period of time but was very reluctant to discuss the content of those conversations, generally stating that she did not remember the specific things they talked about. Except for a few questions about her conversations with the prosecutor, however, A.T. eventually responded to the substance of all of the defense's inquiries.[3]

Thereafter, defense counsel began asking A.T. about her allegations of abuse. After a few questions, the district court called for a recess and made observations on the record about A.T.'s testimony on cross-examination.[4] When questioning resumed,

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[3] We note that when A.T. initially failed to respond, the questions often concerned seemingly irrelevant material. For example, the record contains a series of eight questions about whether A.T. ever helped her grandfather care for his sheep. Five of those questions yielded no audible response; the other three established that A.T. could not remember helping to take care of her grandfather's sheep.

[4] The court stated:

> The record should reflect that when questions are asked of this witness, the questions which she has answered, that the answers are given reasonably quickly, that is within two, three or four seconds in most cases.

(Footnote Continued on Following Page)

defense counsel asked A.T. many questions about to whom she may have mentioned the abuse, and A.T. answered all but a few of those questions. Her answers ranged from specifically acknowledging or denying making certain statements to claims of forgetfulness. Although she failed to respond initially to this line of questioning, it often was the result of imprecise cross-examination. For example, defense counsel asked A.T. four times whether she remembered talking to a counselor, and four times failed to elicit an audible response, before learning that A.T. did not know what a counselor was. At one time, the court admonished defense counsel, suggesting that the questions might be too complicated for the six- and one-half-year-old witness.

(Footnote Continued from Previous Page)

But in many cases where a question is asked and the witness does not respond, she has not responded except -- excuse me. It has -- integrals [sic] of time have elapsed between the time that the question is finished until the next question is asked of up to as much as 45 or 50 seconds.

I don't know what the reason for that is of the witness' inability to comprehend. I sense that some questions are in that category, but there are other questions that appear to be rather simple questions, and the witness nevertheless has not responded and has waited for the next question as much as, as I say, 40, 45 seconds, many times 20 seconds, 25 seconds. And I've been timing that with my watch.

* * *

We have a very unusual situation insofar as this witness is concerned. I would note also on the record that when we started this recess, the witness seemed to be losing concentration. She would look up to the ceiling, would look to the back of the courtroom, she would look over my head, would not in instances face counsel who is inquiring of her.

She twisted and turned, stretched a little bit sometimes. At other times she would put her hand to her mouth and clasp her lips with her hand. We have a very difficult situation here.

We are mindful that Rule 801's cross-examination requirement "should not be viewed as an empty formalism which can be satisfied by the mere fact that the witness is present and can be required to sit still long enough for questions to be put." Id. at 181. Nevertheless, we conclude that A.T. was subject to cross-examination concerning her prior statements alleging abuse. Although A.T. was reluctant to answer some questions and testified that she did not remember making certain statements, she did ultimately answer most of defense counsel's questions. Our reading of the record reveals that A.T. responded to simple and specific questions about specific persons. Indeed, Tome does not identify any specific topic or issue that he feels was important but about which A.T. would not respond. In short, A.T. did willingly respond to Tome's inquiries on cross-examination.

In addition, where the witness answers numerous questions regarding the prior statements, all of the purposes of cross-examination are served. Cross-examination under oath insures that the factfinder can observe the witness's demeanor while responding to questions in a formal setting. It also enables the defense to probe the circumstances under which the statement was made in order to call into question the accuracy or sincerity of the earlier statement. Those conditions clearly resulted from Tome's cross-examination in this case. Moreover, when the child witness answers some but not all of the questions, the factfinder may have an even greater insight into the witness because it can observe the witness's demeanor while both answering and remaining silent. Under these circumstances, we find that A.T.'s general

responsiveness and the jury's ability to observe her demeanor on the stand made her "subject to cross-examination" for purposes of Rule 801.

(2) Implied Charge of Recent Fabrication

Tome next contends that Rule 801 was not applicable because defense counsel did not charge A.T. with recent fabrication or improper motive. It is true that "not every attempt to impeach a witness's credibility constitutes a charge of fabrication." Gaines v. Walker, 986 F.2d 1438, 1444 (D.C. Cir. 1993); see also United States v. Cherry, 938 F.2d 748, 755 (7th Cir. 1991). The trial court has discretion, however, to determine whether the prior consistent statement is offered for such a purpose. See United States v. Herring, 582 F.2d 535, 541 (10th Cir. 1978); see also United States v. Montague, 958 F.2d 1094, 1098 (D.C. Cir. 1992).

In this case, the defense's questions on cross-examination clearly implied that A.T. had fabricated the allegations of abuse out of a desire to live with her mother. Defense counsel questioned A.T. at length regarding her preference for living with her mother. A.T. testified that she had friends in Colorado but none in New Mexico, and that she missed her mother when in New Mexico but did not miss her father when in Colorado. Because this line of questioning attacked more than her general credibility or memory, we find that the district court did not abuse its discretion in concluding that the defense had impliedly charged A.T. with fabricating the abuse. See United States v. Red

Feather, 865 F.2d 169, 171 (8th Cir. 1989) (applying Rule 801(d)(1)(B) where defendant implied on cross-examination that child sexual abuse victim was coached by social services counselors and was prejudiced against her father because of prior punishment and discipline); see also State v. Newman, 790 P.2d 971, 975 (Mont. 1990) (applying state version of Rule 801 where defense repeatedly referred to child sexual abuse victim's possible motives for falsely accusing defendant).

(3) The Pre-motive Rule

Finally, Tome contends that Rule 801(d)(1)(B) does not apply because all of the prior statements were made after A.T.'s alleged motive to fabricate a story of abuse arose. Whether the rule includes such a limitation is an issue of first impression in this circuit.[5] The proper interpretation of the rule is a question of law which we review de novo.

While we have not yet had occasion to decide this issue, it has divided the other circuits for years. Although the text of the rule is silent on this point, some circuits require that the declarant's prior consistent statement precede the time that the alleged motive to lie arose. See, e.g., United States v. Guevara,

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[5] The government contends that this circuit rejected the pre-motive rule in United States v. Rios, 611 F.2d 1335 (10th Cir. 1979), cert. denied, 452 U.S. 918 (1981). The pre-motive rule, however, was not at issue in that case. Rather, Rios involved the use of prior consistent statements to counteract the defense's cross-examination regarding the witness's prior inconsistent statement. Id. at 1349. The issue was whether the prior consistent statement had to precede the prior inconsistent statement; we said no. Id. While discussing the "order" of certain evidence under the Rule, we did not discuss the witness's motives at the time of making the earlier statements.

598 F.2d 1094, 1100 (7th Cir. 1979); United States v. Quinto, 582 F.2d 224, 234 (2d Cir. 1978). Other circuits reject the so-called "pre-motive rule" and do not require the prior consistent statement to precede the alleged motive to lie. See, e.g., Montague, 958 F.2d at 1098; United States v. Pendas-Martinez, 845 F.2d 938, 942 n.6 (11th Cir. 1988); United States v. Parry, 649 F.2d 292, 296 (5th Cir. Unit B, June 1981).[6] We too reject the pre-motive rule and decline Tome's invitation to limit Rule 801(d)(1)(B)'s scope to statements made prior to the existence of the declarant's motive to fabricate.

Those courts that have adopted the pre-motive rule reason that prior consistent statements are "of no probative value to rebut an allegation of recent fabrication when the declarant's motive in making both statements was the same for the simple reason that mere repetition does not imply veracity." United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985) (internal quotation omitted). This may be true. As articulated, however, the pre-motive requirement is a function of the relevancy rules, not the hearsay rules. See Montague, 958 F.2d at 1098; United States v. Miller, 874 F.2d 1255, 1272 (9th Cir. 1989). But even as a function of relevance, the pre-motive rule is clearly too broad: a per se rule is untenable because it is simply not true that an individual with a motive to lie always will do so. Rather, the relevance of the prior consistent statement is more

[6] Because the government offered the statements for their full substantive effect, we do not examine the applicability or interpretation of Rule 801(d)(1)(B) with respect to statements offered only to rehabilitate the live testimony. See United States v. Casoni, 950 F.2d 893, 905 (3rd Cir. 1991).

accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie.[7]

In rejecting the pre-motive rule, however, we do not overlook or devalue the veracity concerns which underlie the rule. To the contrary, we recognize that prior consistent statements made after a strong motive to lie has arisen may evidence only that the declarant is a consistent liar. To determine whether a statement has probative value apart from its repetition, we follow the approach taken by the Ninth Circuit in Miller.[8] Miller treats a declarant's motive to lie as only one factor -- albeit a crucial one -- to be considered when evaluating the relevancy of a prior consistent statement under Federal Rules of Evidence 402 and 403. Id. at 1274. In doing so, "the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant 'probative force bearing on credibility apart from mere repetition.'" Id. (quoting United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986)).

In Miller, the court applied this test to the out-of-court statements of two witnesses. The case involved the espionage

[7] Indeed, courts that have adopted the pre-motive rule appear to factor such information into the equation when determining whether a sufficient motive to lie arose. See, e.g., Cherry, 938 F.2d at 756.

[8] The statements at issue in Miller were offered only to rehabilitate the trial witness's testimony, not for the truth of the matter asserted. 874 F.2d at 1272. The court, however, held that the standards for admission under Rule 801(d)(1)(B) are the same whether the evidence is offered substantively or for rehabilitation. Id. at 1273. The analysis, therefore, applies equally to the admission of prior statements as substantive evidence.

prosecution of Richard Miller, an agent for the Federal Bureau of Investigation who delivered classified documents to two emigrees from the Soviet Union, Svetlana and Nikolay Ogorodonikova. Svetlana testified during Miller's trial that Miller had never shown or given her a classified document. When the government attempted to impeach that testimony, Miller sought to rehabilitate her testimony through evidence of seven prior consistent statements made by Svetlana. After rejecting a strict pre-motive requirement, the court affirmed the exclusion of the statements. The court found that, because all of them were made to federal agents or defense attorneys while she was under criminal investigation or indictment, her motive to fabricate was "powerful," thus stripping the "self-serving" statements of "any significant probative value." Id. at 1274.

In contrast, the court affirmed the admission of prior consistent statements made by Marta York, a government witness and Miller's ex-lover. York testified that Miller had told her that he had given one classified document to his "Soviet girlfriend." Id. at 1275. When the defense attacked that testimony on cross-examination, the government sought to rehabilitate her testimony by introducing evidence that she had repeated Miller's claim to a friend. The defense contended that the prior consistent statement was not relevant because York was upset about her broken love affair with Miller and thus had a motive to lie. Id. The court found that the prior statement, which was made spontaneously, was subject to only a speculative motive to fabricate and had enough probative value independent of its consistency with the witness's

trial testimony to be presented to a jury. Id. Similarly, in United States v. Payne, 944 F.2d 1458, 1471 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1598 (1992), the court addressed the admissibility under Rule 801(d)(1)(B) of prior consistent statements made by a sexually abused foster child. The defense argued that the victim "may have been angry" at the defendant and therefore "falsely accused him for revenge." Id. at 1471 n.12. The court, however, affirmed the admission of the prior consistent statements, finding that the alleged motive to lie was too speculative. Id. at 1471.

Applying this analysis to the present case, we conclude that the district court properly admitted evidence of A.T.'s prior consistent statements under Rule 801(d)(1)(B). The record reveals that A.T. spontaneously made her initial allegation of abuse to her baby-sitter. On cross-examination, Tome implied that A.T. fabricated the allegations about her father because she wanted to live with her mother. Although this argument does present some motive to lie, we do not believe that it is a particularly strong one. See Payne, 944 F.2d at 1471. Moreover, Tome's contention would require us to believe that A.T.'s statements were the result of a calculated scheme to deceive. Yet Tome has presented no evidence that the five-year-old A.T. possessed the ability to appreciate the causal relationships inherent in the conception and implementation of such a scheme. See id.; see also State v. Robinson, 611 A.2d 852, 858 (Vt. 1992) (finding defense's claim that child fabricated story of sexual abuse because of attention he received from it highly speculative). Under these

circumstances, we believe that A.T.'s consistent statements do carry probative force apart from mere repetition.[9] We therefore find no abuse of discretion in admitting these prior consistent statements.[10]

B. Confrontation Clause

Tome contends that, even if the testimony concerning A.T.'s out-of-court statements was admissible under the Federal Rules of Evidence, its admission nevertheless violated his constitutional rights under the Sixth Amendment's Confrontation Clause.[11] We review claims under the Confrontation Clause de novo. See United States v. Ellzey, 936 F.2d 492, 495 (10th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 400 (1991).

"The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). Although an out-of-court statement related by a witness at trial constitutes "testimony" against the accused, "the Confrontation Clause is not

[9] We do not decide whether this result would obtain where the defendant presents evidence of "coaching" by a parent or relative. Although Tome makes stray accusations that A.T.'s mother coached A.T. into making these statements, he does not rely on that argument and cites no evidence in the record in support of that assertion.

[10] Tome did not object that the admission of all of these statements together rendered them more prejudicial than probative under Fed. R. Evid. 403, and we find no plain error.

[11] The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." California v. Green, 399 U.S. 149, 158 (1970). Here, the out-of-court declarant, A.T., was physically present on the witness stand for cross-examination. Tome contends, however, that his right to conduct cross-examination was violated because the witness did not respond sufficiently to his questions. We disagree.

It is clear that "simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns." United States v. Spotted War Bonnett, 933 F.2d 1471, 1474 (8th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1187 (1992); see United States v. Dorian, 803 F.2d 1439, 1446 (8th Cir. 1986) (concluding that five-year-old witness was unable to testify meaningfully because of age and fright); see also Commonwealth v. Kirouac, 542 N.E.2d 270, 272-74 (Mass. 1989) (witness resisted answering nearly all questions asked during cross-examination). Ours is not, however, a situation where the child witness was unable to answer questions on the stand. Rather, as discussed above, the record includes fifty-eight transcript pages of A.T.'s cross-examination during which she was generally responsive. Tome nevertheless challenges the sufficiency of the cross-examination because, in response to a number of questions, A.T. either gave no audible response or testified that she could not remember many things.

The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is

effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985). The concerns animating the Confrontation Clause are satisfied as long as the defendant has the opportunity to expose weaknesses in the witness' testimony. See Owens, 484 U.S. at 559; see also Kentucky v. Stincer, 482 U.S. 730, 744 (1987). Forgetfulness, for example, does not render cross-examination constitutionally infirm because the defense can use the witness's poor memory and trial demeanor to attack the witness's credibility. Owens, 484 U.S. at 559-60; Fensterer, 474 U.S. at 20. In this case, the defendant likewise had the opportunity to mount a successful attack against the partially nonresponsive witness and, in fact, rarely missed an opportunity to comment on the difference between A.T.'s testimony on direct and on cross-examination. Therefore, notwithstanding A.T.'s failure to respond to some questions on cross-examination, we find that Tome's rights under the Confrontation Clause were not violated because A.T.'s testimony provided him a sufficient opportunity to discredit her out-of-court statements.

III. Use of Leading Questions

The trial judge permitted the government to use leading questions during A.T.'s direct examination. We review that decision for an abuse of discretion. See United States v. Rodriguez-Garcia, 983 F.2d 1563, 1570 (10th Cir. 1993). "In this realm the widest possible latitude is given to the judge on the scene." Rodriguez v. Banco Cent. Corp., 990 F.2d 7, 12 (1st Cir. 1993).

Fed. R. Evid. 611(c) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." This circuit has long recognized the necessity of using leading questions to elicit testimony from child sex abuse victims. See Antelope v. United States, 185 F.2d 174, 175 (10th Cir. 1950). Indeed, the Advisory Committee Notes to Rule 611(c) expressly identify the examination of child witnesses as an exception to the general prohibition on the use of leading questions during direct examination. Fed. R. Evid. 611(c) advisory committee's note; see also United States v. Castro-Romero, 964 F.2d 942, 943-44 (9th Cir. 1992) (leading question used during direct examination of 8-year-old sex abuse victim).

In this case, A.T.'s direct examination did involve a significant number of leading questions. It is evident from the record, however, that A.T. was reluctant to testify about her abuse. In fact, questioning was halted several times in order for A.T. to regain her composure and willingness to discuss the events at issue. The defense twice objected to the leading questions; both times the district judge decided to permit them. Under these circumstances, we cannot say that the district court abused its discretion in determining that leading questions were necessary to develop A.T.'s testimony.

IV. Cumulative Error and Fundamental Unfairness

Finally, Tome argues that "[t]his Court need not decide whether the individual errors discussed herein require reversal of

Tome's conviction; it is clear that the cumulative effect of those errors rendered the trial in this case fundamentally unfair." We interpret this assertion to raise two distinct arguments.

First, Tome appears to make a preemptory strike at a potential harmless error analysis. In this regard, he contends that, even if the alleged trial errors were individually harmless, they were not harmless in the aggregate. This argument is unavailing, however, because we already have concluded that the trial court's individual rulings were not erroneous. "[A] cumulative-error analysis aggregates only actual errors to determine their cumulative effect." United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (emphasis added); see also United States v. Haar, 931 F.2d 1368, 1377 (10th Cir. 1991) (effect of non-errors not included in aggregation).

Second, we interpret Tome's argument to challenge the "fundamental fairness" of his trial under the Due Process Clause of the Fifth Amendment. A trial is fundamentally unfair under the Fifth Amendment's Due Process Clause if it is "shocking to the universal sense of justice." United States v. Russell, 411 U.S. 423, 432 (1973) (internal quotation omitted). In Rivera, we noted that courts may consider prejudicial circumstances that do not amount to error in the course of reviewing for fundamental unfairness, but only when actual error has also occurred. 900 F. 2d at 1477. Thus, "the linchpin of the analysis seems to be that an error was committed which, when considered with other circumstances, led to a fundamentally unfair trial." Id.

Here, as in Rivera, Tome requests a fundamental unfairness analysis without any actual error on which to hang his proverbial hat. Tome contends that this is a case where the government's scripted evidence, introduced through leading questions, and the defense's inability to cross-examine the source of that evidence combined synergistically to deny the defendant a fair trial. However, we already have approved of the use of leading questions in this case and have determined that A.T. was available for cross-examination under both Rule 801 and the Confrontation Clause. Moreover, the record reveals that the defendant presented his own witnesses and evidence while mounting a continuing attack on the credibility of the government's witnesses, A.T. included. The fact that a number of important evidentiary issues were decided against him, and that the jury chose to believe the government's witnesses rather than his, simply does not shock any universal sense of justice. Tome's trial, though not perfect, was fair.

We **AFFIRM**.

United States' District Court
for the District of New Mexico

FILED
UNITED STATES DISTRICT COURT
SANTA FE, NEW MEXICO

MAY 2 2 1992

CLERK

UNITED STATES OF AMERICA

V.

JUDGMENT IN A CRIMINAL CASE

Name: MATTHEW WAYNE TOME
DOB: 05-22-65
SSN: 585-08-5916

Case Number: 91-314 SC

Co. Reg.
To Vote: McKinley County

Mailing Address: Post Office Box 664
Shiprock, NM 87420

Ann Steinmetz (Appointed)
Attorney for Defendant

Residence Address: Same as above

ENTERED ON DOCKET
MAY 2 2 1992

THE DEFENDANT ENTERED A PLEA OF:

__ guilty ___ nolo contendere as to _____ and
__ not guilty as to count(s)_____.

THERE WAS A:

_ finding _X_ verdict of guilty as to one-count Indictment filed on June 4, 1991
___As tried to the Court. _X_ As tried before a Jury.

THERE WAS A:

__ finding _X_ verdict of guilty as to one-count Indictment filed on June 4, 1991
__.
___judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: (Fel. _X_ Misd. ____).

Crime on an Indian Reservation: Aggravated Sexual Abuse, 18 U. S. C. § 1153, 18 U. S. C. § 2241(c) and 18 U. S. C. 2245(2)(A)(B) as charged in the one-count Indictment filed on June 4, 1991.

* SETTING *
5/27/92
CALENDARED

ATTACHMENT B

(Continuation Sheet)

The Court adopts the factual findings and guideline applications in the presentence report except for the application of Section 2A3.1(b)(1) as a specific offense characteristic, and reduces the base offense level by four (4) levels, and finds that there is no need for an evidentiary hearing as there are no other disputed facts.

The Court finds that the offense level is now thirty-three (33) and the criminal history category is I, establishing a guideline imprisonment range of 135 to 168 months. The Court takes judicial notice that the defendant had sexual intercourse with his four (4) year old daughter in order to gratify his sexual desires. The instant offense however, is the defendant's first felony conviction.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court as to the Indictment that the defendant, Matthew Wayne Tome, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 144 months. Upon release from confinement, the defendant shall be placed on Supervised Release for a term of three (3) years. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U. S. Probation Office in the district to which he is released. While on supervised release, the defendant shall not commit nay federal, state, or local crime, shall not possess illegal controlled substances, shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990, and the following special conditions.

1) The defendant shall not possess firearms, explosives or other dangerous weapons.

2) The defendant shall participate as directed in a program for substance abuse approved by the U. S. Probation Office, which may include testing to determine whether the defendant has reverted to the use of alcohol.

Pursuant to the Victim and Witness Protection Act of 1982, the Court finds that the defendant's lack of financial resources outweighs the need to provide restitution, therefore, restitution will not be imposed.

Based on the defendant's lack of financial resources, the Court will not impose a fine or an additional fine which will pay government costs of any imprisonment or supervised release.

The Court finds the defendant is not a flight risk, therefore voluntary surrender will be granted for June 30, 1992.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on Page Three of this judgment are imposed.

Name: TOME, Matthew Wayne
Case Number: 91-314 SC

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law enforcement officer.
(2) associate only with law-abiding persons and maintain reasonable hours.
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes.)
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;
(6) follow the probation officer's instructions and report as directed.
The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is further ordered that the defendant shall pay to the United States a Special Assessment of $50, which shall be due immediately and payable by cashier's check, bank or postal money order, to the United States District Court Clerk, Post Office Box 689, Albuquerque, New Mexico 87103.

Original Fine Amount: _____
Amount Due: _____
Schedule of Payments: _____
_____

Original Restitution Imposed: _____
Amount Due: _____
Payable To: _____
_____

Schedule of Payments: _____
_____
_____

IT IS FURTHER ORDERED that until the judgment is paid in full, the defendant shall notify the United States Attorney of any change in address within 30 days of that change.

IT IS FURTHER ORDERED that _____ be DISMISSED on the motion of the United States.

93-0692

Page Four

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

X The Court orders commitment to the custody of the Bureau of Prisons and recommends:

The Court recommends FCI Safford, Arizona

In accordance with Rule 32(a)(2) of the Rules of Criminal Procedure, you have the right to appeal the entry of judgment within ten (10) days, and you have the right to apply for leave to appeal in forma pauperis if unable to pay the cost of an appeal.

May 15, 1992
Date of Imposition of Sentence

Santiago E Campos
Signature of Judicial Officer

Santiago E. Campos U.S. District Judge
Name and Title of Judicial Officer

MAY 2 2 1992
Date

Review of Sentence: Pursuant to 18 USC 3742, within ten (10) days of the entry of judgment, you have the right to appeal the final sentence of the Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 USC 994(1). You have the right to apply for leave to appeal in forma pauperis if unable to pay the cost of an appeal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

RECEIVED
MAY 2 7 1992
FEDERAL PUBLIC DEFENDER

_____
United States Marshal

By: _____

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Joseph W. Gandert, declare under penalty of perjury that I am a member of the bar of this Court and as counsel for Matthew Wayne Tome, petitioner, that I personally mailed a copy of the Petition for Writ of Certiorari by first class mail, postage prepaid, to the Solicitor General, Department of Justice, Washington, DC 20530, this 24 day of November, 1993.

Joseph W. Gandert

Joseph W. Gandert
Attorney for Petitioner
Federal Public Defender
P.O. Box 449
Albuquerque, NM 87103
(505) 766-3293

ORIGINAL

No. 93-6892 (3)

Supreme Court, U.S.
FILED
JAN 31 1994
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
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RECEIVED
FEB - 1 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. 93-6892

MATTHEW WAYNE TOME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-25, is reported at 3 F.3d 342.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. The petition for a writ of certiorari was filed on November 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of aggravated sexual abuse of a child, in violation of 18 U.S.C. 1153,

QUESTIONS PRESENTED

1. Whether out-of-court statements of a child sexual abuse victim were properly admitted at trial pursuant to Fed. R. Evid. 801(d)(1)(B).

2. Whether the victim was sufficiently subject to cross-examination to warrant admission of her out-of-court statements.

2241(c), and 2245(2)(A)-(C). He was sentenced to 144 months' imprisonment. The court of appeals affirmed. 3 F.3d 342-353.[1]

1. The evidence at trial showed that in June 1989 petitioner, a Navajo Indian, sexually assaulted his four-year-old daughter, A.T., by placing his penis in her vulva and mouth, by placing his fingers in her vulva, and by having contact between his mouth and her vulva. The attack took place on an Indian reservation while petitioner had custody of the child.

A.T. was born on June 18, 1985; petitioner and his wife, Beverly Padilla, were divorced in September 1988. After the divorce, the parents had joint custody of A.T., with petitioner having primary physical custody. Padilla had visitation rights and had custody of A.T. on weekends and holidays. Beginning in June 1989, petitioner and Padilla alternated two-week periods of custody of A.T. for the summer. Padilla picked A.T. up on June 16 and later celebrated A.T.'s birthday on June 18; A.T. had already had a small birthday party at petitioner's house. 3 F.3d at 344; Gov't C.A. Br. 2-3.

That same June, around the time of A.T.'s fourth birthday, petitioner undressed his daughter and himself. A.T. tried to cross her legs, but petitioner forced them apart. He then climbed on top of A.T. and penetrated her vulva with his penis. He also put his penis in A.T.'s mouth. After petitioner was fin-

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[1] The appendix to the petition for a writ of certiorari contains only the odd-numbered pages of the typescript opinion of the court of appeals. Consequently, we shall refer to the published opinion.

ished, A.T. went to the bathroom and wiped blood from her vaginal area. Gov't C.A. Br. 3.

A.T. did not tell her mother of the attack for more than a year. Under a modified custody order, Padilla had custody of A.T. for the summer of 1990, and she was living with Padilla and her new husband in Colorado Springs, Colorado. A custody review hearing was scheduled for August 24 in Shiprock, New Mexico. On August 22, the day before the family was going to drive to Shiprock, A.T. spoke to Lisa Rocha, her babysitter, and said, "Please don't let my mom take me back to my father." When Rocha asked why, A.T. responded, "Because my dad gets drunk and he thinks I'm his wife." Because Rocha was preoccupied with her own child at the time, A.T.'s words did not immediately register with her. After a few minutes, Rocha asked A.T. what she meant, but A.T. would not talk to her and instead ran off to play with other children. 3 F.3d at 345; Gov't C.A. Br. 4.

Beverly Padilla and A.T. missed the custody hearing in New Mexico because it had been rescheduled. On Sunday, August 26, Rocha telephoned Padilla, told her what A.T. had said on August 22, and asked Padilla to speak to A.T. The next morning Rocha telephoned Padilla and again urged her to speak to A.T. When A.T. would not speak to Padilla, Padilla asked Rocha to come to Padilla's house and talk to A.T. Gov't C.A. Br. 4-5.

When Rocha arrived, Padilla went into another room. Rocha asked what A.T. had meant about her father treating her like a wife. A.T. replied that her father did "nasties" to her. Rocha

asked her to explain. A.T. said that her father had dragged her by the arms into the bedroom, where he took off her clothes and put her on the bed. She said she had tried to keep her legs crossed, but her father had forced them open. He then lay on top of her, and she felt a sharp pain "down there," pointing to her abdomen.[2] A.T. also said she had wiped herself afterwards and there was blood on the tissue. 3 F.3d at 345; Gov't C.A. Br. 5.

Rocha and Padilla then contacted the police. On August 29, Child Protection Services caseworker Kae Ecklebarger interviewed A.T. Ecklebarger asked if A.T. knew why she was there; A.T. said that it was because of what "Matthew" had done to her. She said that petitioner had "put his balls" in her. Ecklebarger asked if A.T. could remember one specific time; A.T. said she could remember one time especially clearly. She said her father had told her to take off her clothes, but she had refused. Petitioner then removed her panties, put her on the floor, and "put his balls" in her. Ecklebarger brought out anatomically correct dolls and asked A.T. to show what petitioner had done. A.T. undressed the male doll and removed the panties from the girl doll, placed the girl doll on its back, and took the penis of the male doll and tried to insert it in the vaginal area of the girl doll. She then moved the male doll up and down on the girl doll. 3 F.3d at 346; Gov't C.A. Br. 5-6.

---

[2] At trial, Padilla said she overheard A.T.'s statement that her father had pulled her legs apart. 3 F.3d at 346.

A.T. also said she had tried to keep her legs crossed. She got on the floor and demonstrated how petitioner had pulled her ankles up to her buttocks and forced her knees apart, and then had "put his balls" in her. She said petitioner had kissed her all over her body, including on her vaginal area, which she indicated by pointing to the girl doll. Petitioner had asked her to touch him, she said, but she had refused. When Ecklebarger asked her where petitioner had asked A.T. to touch him, she pointed to the penis on the male doll. A.T. also related that she had gone to the bathroom afterwards and had wiped herself, and there was blood. She kept the tissue and showed it to her grandmother and aunt, saying, "Look what Matthew did to me." A.T. said her grandmother later had confronted petitioner, who then turned to A.T. and said, "It's all your fault." A.T. said she had answered, "No, it isn't, it's all your fault." A.T. said her grandmother threatened petitioner, but he did not stop; instead, "he did it every single day and then he stopped." Gov't C.A. Br. 6; 3 F.3d at 346.

Ecklebarger then referred A.T. to Dr. Karen Kuper, a local pediatrician. Dr. Kuper questioned A.T. in order to determine what injuries had occurred. When Dr. Kuper asked whether anyone had ever touched her in a way that hurt or was scary, A.T. said, "Just my dad." When Dr. Kuper asked where her father had touched her, A.T. pointed to the vaginal area on an ordinary doll in Dr. Kuper's office. A.T. also said that petitioner had "put his fingers inside me." She said that had hurt and had scared her.

When Kuper asked whether petitioner had touched A.T. with anything else, A.T. replied, "His thing." She could not say what "his thing" was, but she pointed to the doll's genital area. Kuper asked what petitioner had done with his "thing"; A.T. said he had "put it inside of me," again pointing to the doll's vaginal area. 3 F.3d at 345-346; Gov't C.A. Br. 7-8.

Dr. Kuper then performed a physical examination on A.T. She concluded that A.T.'s vaginal opening was enlarged and that her hymenal tissue was abnormally thin. There was no indication of fresh trauma to the vaginal opening. Dr. Kuper opined that the size of the vaginal opening and the small amount of hymenal tissue was consistent with penetration of the vagina by an object such as a penis. The lack of fresh trauma indicated that there had been no penetration within recent months. Dr. Kuper also said that it would have required more than one penetration to cause both the enlarged vaginal opening and the lack of hymenal tissue. Gov't C.A. Br. 8; 3 F.3d at 346.

On September 21, 1990, A.T. saw Dr. Laura Reich, another pediatrician, for treatment of a rash on her thighs. A.T. told Dr. Reich that her father had put his "thing" in her. After learning that A.T. already had spoken to Social Services, Reich did not question her further. Reich then examined A.T. and determined that her hymen was not intact and that her vaginal opening was larger than normal. According to Dr. Reich, A.T.'s physical condition was consistent with penetration by an adult

penis, probably more than 10 times. 3 F.3d at 346; Gov't C.A. Br. 8-9.

Dr. Jean Spiegel, a pediatrician and expert in child sexual abuse, examined A.T. the next year, on September 3, 1991, in order to give a second opinion on A.T.'s physical condition. Spiegel conducted a vaginal examination and found that A.T. had a very thin rim of hymenal tissue and a large hymenal opening for her age. Spiegel's findings were consistent with chronic vaginal penetration. The penetration also was not recent; Dr. Spiegel could say only that it had occurred more than four to six months prior to her examination. Spiegel said that repetitive penetration by a penis, finger, or similar object could have caused the enlargement A.T.'s vaginal opening. Spiegel also spoke to A.T. outside her mother's presence. A.T. said her father had touched her breasts and "front privates," as well as her bottom. 3 F.3d at 346; Gov't C.A. Br. 9.

2. At trial, A.T. was the government's first witness. She was six and one-half years old at the time. The judge extensively questioned A.T. to determine whether she was competent to testify. The judge also permitted the prosecutor to make extensive the use of leading questions. Through her testimony and use of dolls, and by pointing to body parts, A.T. described the abuse by petitioner. A.T. was then subject to two days of cross-examination. Defense counsel suggested through cross-examination that A.T. missed her mother when she was not with her, was afraid

of returning to her father, and feared that her mother might go to jail. 3 F.3d 345, 347-349.

The government also presented as witnesses those individuals who had heard statements by A.T. about petitioner's abuse. Petitioner objected to the admission of A.T.'s out-of-court statements through those witnesses, but the district court overruled those objections. The district court admitted the statements to the three doctors under Fed. R. Evid. 803(4), the exception to the hearsay rule for statements made for purposes of medical diagnosis or treatment, and under Fed. R. Evid. 801(d)(1)(B), which provides that an out-of-court statement is not hearsay if it is a prior consistent statement of a testifying witness and is offered to rebut an express or implied charge of recent fabrication.[3] The district court admitted A.T.'s statements to Rocha (as well as those overheard by Padilla) under Fed. R. Evid. 801(d)(1)(B). The government argued that the statements to Kae Ecklebarger were admissible under Fed. R. Evid. 803(24), the catch-all hearsay exception, because the statements were similar to those that are admissible under the medical-treatment exception; the court did not expressly state the ground for admitting the statements to Ecklebarger. The court admitted A.T.'s first statement to Rocha under the catch-all hearsay exception because the statement was similar to those admissible

[3] The court found that A.T.'s August 22 and August 27 statements were admissible to rebut the implication that A.T. had recently fabricated allegations of sexual abuse because she wanted to live with her mother rather than with her father. Gov't C.A. Br. 11-12.

under Fed. R. Evid. 803(3) for statements relating the declarant's existing state of mind. Gov't C.A. Br. 10-12.

3. On appeal, petitioner renewed his claims that A.T.'s out-of-court statements were not admissible. The court of appeals determined that all the statements were admissible under Rule 801(d)(1)(B), and did not reach the question of their admissibility under Rules 803(4) or 803(24). 3 F.3d at 347.

The court of appeals rejected petitioner's claim that A.T. was not subject to cross-examination concerning her prior statements about sexual abuse, as is required by Rule 801(d)(1)(B). 3 F.3d at 347-349. The court concluded that "[a]lthough A.T. was reluctant to answer some questions and testified that she did not remember making certain statements, she did ultimately answer most of defense counsel's questions," and petitioner failed to "identify any specific topic or issue about which A.T. would not respond." Id. at 348-349. The court of appeals also found that petitioner clearly had implied through cross-examination that A.T. had fabricated the sexual abuse allegations in order to remain with her mother. Id. at 349.

Finally, the court of appeals concluded that A.T.'s prior statements did not have to predate the purported motive to fabricate in order to be admissible under Rule 801(d)(1)(B). 3 F.3d at 349-351. The court viewed the issue of whether the prior statements were made before the alleged motive arose "as a function of the relevancy rules, not the hearsay rules." Id. at 350. While the timing of the motive is a "crucial" factor in assessing

relevancy, the court explained, the determination of the probative value of the prior statement must be made in light of "the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie." Ibid. In this case, the court found that "A.T.'s consistent prior statements do carry probative force apart from mere repetition," and that the district court did not abuse its discretion in admitting them." Id. at 351.[4]

ARGUMENT

1. Petitioner contends (Pet. 8-15) that the court of appeals erred in admitting A.T.'s prior consistent statements under Fed. R. Evid. 801(d)(1)(B) without requiring a showing that the statements were made before any motive to fabricate arose. He also argues that the court's decision conflicts with decisions of other courts of appeals. The court of appeals correctly rejected petitioner's contention that Rule 801(d)(1)(B) requires that the prior consistent statement must predate the motive to fabricate, and the claimed circuit conflict does not warrant this Court's review.

a. Rule 801(d)(1)(B) provides that an out-of-court statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the

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[4] The court of appeals also rejected petitioner's claims that the admission of A.T.'s prior statements violated the Confrontation Clause, 3 F.3d at 351-352, that the district court improperly permitted the prosecutor to use leading questions in examining A.T., id. at 352-353, and that cumulative error required reversal, id. at 353. Petitioner does not renew those claims here.

statement, and the statement is * * * consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence." As petitioner acknowledges (Pet. 8), the text of the Rule contains no requirement that the prior statement be made before the purported motive to fabricate arose. In the absence of such a textual requirement, there is no basis for reading into the Rule a prerequisite to its application that the drafters did not provide. When it enacted the Federal Rules of Evidence, Congress "presumably made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, we must enforce the words that it enacted." United States v. Salerno, 112 S. Ct. 2503, 2507 (1992); id. at 2508 (declining invitation to "ignore" the "language of Rule 804(b)(1)").

Although Rule 801(d)(1)(B) does not require that the prior statement be made before the motive to lie arose, the timing of the statement bears on its relevance. Rule 801(d)(1)(B) provides an exception to the hearsay rule, but it does not automatically justify admitting a statement. The statement must still be relevant pursuant to Fed. R. Evid. 402, and its probative force must outweigh its potential for prejudice under Fed. R. Evid. 403. A prior consistent statement made under the influence of the same motive to lie may be found irrelevant or otherwise inadmissible, since "mere repetition does not imply veracity." 3 F.3d at 350, quoting United States v. Harris, 761 F.2d 394, 399

(7th Cir. 1985). The evaluation of that issue is not a function of Fed. R. Evid. 801(d)(1)(B), which does not address the issue, but is a funcion of the relevancy provisions.

b. In declining to impose a strict requirement under Rule 801(d)(1)(B) that the motive to lie must arise after the time of the prior statement, the court of appeals in this case joined the majority of courts of appeals that have considered the issue. See United States v. Montague, 958 F.2d 1094, 1098 (D.C. Cir. 1992); United States v. Miller, 874 F.2d 1255, 1272 (9th Cir. 1989); United States v. Pendas-Martinez, 845 F.2d 938, 942 (11th Cir. 1988); United States v. Hamilton, 689 F.2d 1262, 1273 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983); United States v. Parry, 649 F.2d 292, 296 (5th Cir. 1981). See also 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(1)(B)[01], at 801-201 (1993).

A minority of the circuits, however, have articulated the view under Rule 801(d)(1)(B) that "as was the situation under the law of evidence prior to the adoption of the Federal Rules of Evidence * * * the proponent must demonstrate that the prior consistent statement was made prior to the time the supposed motive to falsify arose." United States v. Quinto, 582 F.2d 224, 234 (2d Cir. 1978). Accord United States v. Bowman, 798 F.2d 333, 338, cert. denied, 479 U.S. 1043 (1987); United States v. Henderson, 717 F.2d 135, 138 (4th Cir. 1983), cert. denied, 465

U.S. 1009 (1984); United States v. Feldman, 711 F.2d 758, 766 (7th Cir. 1983).[5]

Although the courts of appeals have taken different positions on the issue, this Court's intervention is not required. In most cases, the different interpretations of Rule 801(d)(1)(B) will not lead to different results, because the minority approach is founded on a principle of relevance that is also incorporated into the majority rule. As the Second Circuit explained in United States v. Quinto, under the law of evidence before the adoption of the Federal Rules of Evidence, a prior statement must have been made before the motive to fabricate arose, because "[o]nly then was the prior consistent statement 'relevant' on the issue of credibility." 582 F.2d at 233. The Second Circuit held that "[t]he standards for determining whether prior consistent statements can now be admitted as substantive evidence are precisely the same as the traditional standards." Ibid. Most courts following the majority rule also make the issue of prior motive an important consideration in evaluating the relevance of a prior statement. The court in this case made that clear, see 3 F.3d at 350 (prior motive a "crucial" factor in measuring rele-

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[5] Two circuits have reserved the issue. See United States v. Casani, 950 F.2d 893, 905-906 (3d Cir. 1991); United States v. Piva, 870 F.2d 753, 758 (1st Cir. 1989). Petitioner contends (Pet. 9) that the Ninth Circuit adopted the minority rule in United States v. Smith, 893 F.2d 1573, 1581 (9th Cir. 1990). In United States v. Payne, 944 F.2d 1458, 1470-1472 (9th Cir.), cert. denied, 112 S. Ct. 1598 (1992), however, that circuit made clear that it had held in Miller that there is no requirement under Rule 801(d)(1)(B) that the prior statement be made before the motive to lie, and that it was adhering to that rule.

vance), as have other circuits, see United States v. Montague, 958 F.2d at 1098; United States v. Miller, 874 F.2d at 1274 ("very crucial factor"); United States v. Lawson, 872 F.2d 179, 182 (6th Cir. 1989) (noting that prior statement is "more likely" to be probative when it preceded the motive to lie). While the majority rule provides a degree of flexibility that may be missing from the minority approach, the two approaches produce consistent rulings in most cases.[6]

There is no showing at this time that use of the two approaches is giving rise to significant differences in outcome in different circuits. For example, it is far from clear that A.T.'s out-of-court statements would have been barred under the minority approach. As the court of appeals noted, while A.T. conceivably had some motive to fabricate petitioner's abuse in order to stay with her mother, the contention that the prior statements were motivated by that desire "would require us to believe that A.T.'s statements were the result of a calculated scheme to deceive," and petitioner "presented no evidence that the five-year-old A.T. possessed the ability to appreciate the

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[6] Moreover, at least two courts following the minority approach have diluted its force by holding that even when a prior consistent statement is inadmissible under Rule 801(d)(1)(B) because the motive to lie existed when the statement was made, the prior statement may still be admissible to rehabilitate the witness after a challenge to the witness's credibility. See United States v. Brennan, 798 F.2d 581, 587-589 (2d Cir. 1986); United States v. Harris, 761 F.2d 394, 400 (7th Cir. 1985). In United States v. Miller, 874 F.2d at 1273, the Ninth Circuit characterized that distinction as "creat[ing] an end run around Rule 801(d)(1)(B) in order to blunt the apparent harshness of the [no motive] requirement."

cause relationships inherent in the conception and implementation of such a scheme."[7] 3 F.3d at 351. Under those circumstances, courts following the minority approach might well have found petitioner's claim of prior motive too speculative to require exclusion of A.T.'s statements. See United States v. Cherry, 938 F.2d 748, 756 (7th Cir. 1991) ("Mr. Cherry's second argument -- that [the child sex abuse victim] already had a motive to fabricate when she talked to Levine -- is highly speculative and is not supported by the evidence.").

c. In any event, the admissibility of the most significant out-of-court statements in this case does not depend on whether the majority rule or the minority rule under Rule 801(d)(1)(B) is applied. There were other evidentiary bases for admitting the most elaborate of A.T.'s out-of-court statements, and the remaining statements were merely cumulative of that evidence. A.T.'s most thorough descriptions of her father's sexual abuse were related by Dr. Kuper and Caseworker Kae Ecklebarger. In addition to finding that Dr. Kuper's testimony was admissible under Rule 801(d)(1)(B), the trial court admitted that testimony under Rule

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[7] Petitioner errs in arguing (Pet. 13) that it was inconsistent for the court of appeals to find that petitioner had charged recent fabrication, while suggesting that the five-year-old A.T. lacked the capacity to act on the motive to fabricate charged by petitioner. The issue of whether petitioner made the charge of fabrication depends on what lines of cross-examination he pursued; the issue of whether a motive to fabricate could plausibly explain statements made a year or more before trial depends on the capability of the child victim to fabricate at that time and the likelihood that the child would have fabricated a story incriminating petitioner at the time rather than later, in anticipation of her testimony in court.

803(4), the medical-treatment-or-diagnosis exception to the hearsay rule. That determination was correct.

Dr. Kuper testified that she took A.T.'s medical history in order to help ascertain what injuries had occurred, and that A.T.'s statements were helpful to Kuper's diagnosis of A.T.'s condition. Dr. Kuper explained that she had been trained in how to deal with cases involving sexual or physical abuse of children, and that she watches very closely for evidence of coaching by a parent. To check whether a child is fabricating, she observes also whether the child answers questions easily and in a forthright manner and whether the physical examination corroborates the history related by the child. Gov't C.A. Br. 8 n.4. A.T. testified that she recognized that Dr. Kuper's role was to "help kids," which indicates that A.T. understood that it was in her interest to be candid in the matters she described -- the rationale underlying the medical-treatment exception. See White v. Illinois, 112 S. Ct. 736, 743 (1992); Ring v. Erickson, 968 F.2d 760, 762 (8th Cir. 1992).[8] Given that foundation, the district court did not abuse its discretion in admitting Dr. Kuper's statement under Rule 803(4). Accord United States v. George, 960 F.2d 97, 99-100 (9th Cir. 1992); United States v. Provost, 875 F.2d 172, 177 (8th Cir.), cert. denied, 493 U.S. 859 (1989); United States v. Cherry, 938 F.2d at 757.

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[8] A.T.'s identification of her abuser was also admissible under Rule 803(4), because in cases of child abuse it is necessary to identify the abuser in order to prevent recurrence of injury. United States v. Renville, 779 F.2d 430, 437-438 (8th Cir. 1985).

Although the district court did not give the basis for its admission of A.T.'s statement's to Ecklebarger, that testimony likewise was admissible under Rule 803(4) for the same reason that Dr. Kuper's testimony about medical history was admissible under that rule. Ecklebarger was a highly trained social worker who was an expert in child abuse cases and in interviewing victims (Tr. 313-314, 333-335, 353-355). She conducted her interview of A.T. outside Padilla's presence, and she was careful not to ask leading questions (Tr. 315-316). Ecklebarger also spoke to A.T. about the concept of telling the truth. Although she did not use that specific term but rather spoke about the difference between stories and what really happened (Tr. 337, 355-356), Ecklebarger nonetheless impressed upon A.T. the importance of telling the truth. Finally, the purpose of her interview was to diagnose whether A.T. had suffered abuse (see Tr. 326-327, 353-354). A victim's statements about child abuse to a social worker in such circumstances fall within Rule 803(4). United States v. Balfany, 965 F.2d 575, 581 (8th Cir. 1992); United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir. 1987).

A.T.'s remaining out-of-court statements were much briefer and not nearly as explicit as her statements to Kuper or Ecklebarger, and at least one them was also admissible on evidentiary bases other than Rule 801(d)(1)(B).[9] Since Kuper's and

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[9] A.T.'s first statement to her babysitter, asking the babysitter not to let A.T.'s mother return her to her father because he "thinks I'm his wife," was also admissible under Rule 803(3) as a statement of present, then-existing fear. If that statement did not meet the requirements of Rule 803(3), then, as

Ecklebarger's testimony was properly admitted under Rule 803(4) and the remaining statements were cumulative and provided far less impressive evidence of abuse, the application of Rule 801(d)(1)(B) to A.T.'s other out-of-court statements has no significance for the outcome of this case. At worst, the admission of that evidence would constitute harmless error.

2. Petitioner also argues (Pet. 15-19) that A.T.'s out-of-court statements were improperly admitted because she was effectively unavailable for cross examination within the meaning of Rule 801(d)(1)(B). The court of appeals, in a careful and thorough opinion, correctly resolved that issue against petitioner, and there is no reason for further review of his factbound claim.

A.T. testified and was cross-examined for two days. On the first day, she answered all the questions defense counsel asked of her, which were background questions. The second day of cross-examination was more difficult. A.T. did not respond to 66 of 249 questions, though she did eventually respond to the substance of all of defense counsel's questions. 3 F.3d at 348. She also answered counsel's questions about her allegations of abuse and to whom she may have reported the abuse. In some instances she acknowledged or denied making statements; in others she said she did not remember. It sometimes took repetitive inquiry to get A.T. to respond, but the district court pointed

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the district court found, it was admissible under Rule 803(24) because it was similar to statements admitted under Rule 803(3).

out that defense counsel's questions might have been too complicated for A.T., who was six and one-half years old at the time of trial. Ibid.

The court of appeals concluded that under the circumstances, A.T. was sufficiently subject to cross-examination concerning her prior statements to satisfy the requirements of Rule 804(b)(1)(B). 3 F.3d at 348-349. The court noted that although A.T. initially was reluctant to answer some questions, she did ultimately answer most questions. The court said that "[o]ur reading of the record reveals that A.T. responded to simple and specific questions about specific persons. Indeed, [petitioner] does not identify any specific topic or issue that he feels was important but about which A.T. would not respond." Id. at 349.

As this Court has recognized, "[o]rdinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." United States v. Owens, 484 U.S. 554, 461 (1988). Here, A.T. responded to petitioner's questions sufficiently to allow the jury to observe her demeanor and to weigh her credibility. United States v. Spotted War Bonnet, 933 F.2d 1471, 1474-1475 (8th Cir. 1991), cert. denied, 112 S. Ct. 1187 (1992). This was not a case, such as United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986), where the child witness was unable to testify meaningfully at trial. Instead, as the court of appeals found, A.T. eventually responded to all lines of inquiry that petitioner's counsel raised. As even her failure to respond to questions when they

were first asked had value for the cross-examination, as it could be used to suggest that the witness was unable to provide satisfactory answers on key points relating to testimony and prior statements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1994

Supreme Court, U.S.
FILED
APR 11 1994
OFFICE OF THE CLERK

No. 93-6892

In The Supreme Court of the United States

October Term, 1993

Matthew Wayne Tome,
Petitioner,

v.

United States,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 24, 1993
CERTIORARI GRANTED FEBRUARY 22, 1994

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6/4/91	INDICTMENT.
3/3/92	Jury selection and trial.
3/3/92	JURY INSTRUCTIONS. (SEALED)
	GENERAL VERDICT: GUILTY of Aggravated Sexual Assault as charged in Indictment.
	SPECIAL VERDICT. (SEALED)
5/22/92	JUDGMENT.
6/1/92	NOTICE OF APPEAL by deft from Judgment entered 5-22-92.
6/18/92	NOTICE OF APPEAL by Govt from Judgment entered 5-22-92.

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 91-314 SC

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MATTHEW WAYNE TOME,
Defendant.

---

18 U.S.C. 1153 and 18 U.S.C. 2241(c) and 18 U.S.C. 2245(2)(A)(B): Crime on an Indian Reservation: Aggravated Sexual Abuse of a Minor.

SUPERSEDING INDICTMENT

The Grand Jury charges:

Commencing on or about the months of June and July, 1989, the exact dates being unknown to the Grand Jury, within the exterior boundaries of the Navajo Indian Reservation, in or near the town of Mitten Rock, New Mexico, in Indian country, the defendant MATTHEW WAYNE TOME, an Indian, knowingly engaged and attempted to engage in sexual acts to wit: contact between the penis and the vulva, contact between the mouth and the penis, contact between the mouth and the vulva and penetration of the genital opening by hand and finger with intent to abuse, humiliate, harass, degrade, arouse and gratify the sexual desire of any person, with a female Indian child, who had not then attained the age of 12 years.

In violation of 18 U.S.C. §§ 1153, 2241(c), 2245(2)(A)(B).

A TRUE BILL:

/s/ Carl A. Montoya
Foreperson of the Grand Jury

/s/ [Illegible]

WILLIAM L. LUTZ
United States Attorney

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 91-314 SC

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MATTHEW WAYNE TOME,
Defendant.

TRANSCRIPT OF PROCEEDINGS

* * * *

TESTIMONY OF ANDREA TOME,
WITNESS ON BEHALF OF GOVERNMENT,
CROSS-EXAMINATION

* * * *

[116] Q What other kinds of things did you do at your real dad's house besides go to preschool?
A Just play.
Q Just play. What kind of things did you play?
A I didn't have no one to play with.
Q Did you just play by yourself then?
A Yes.
Q Did you have any toys there?
A Yes.
Q When you stayed at your real mom's, did you have people to play with there?
A Yes.
Q Was it better to stay with her than your real dad because you had people to play with? Do you know?

* * * *

[132] Q Andrea, when you lived with Matthew, did your mother live in Colorado some of the time?
A Yes.
Q And did she seem far away to you?
A Yes.
Q When you lived with Matthew and your mother lived in Colorado, you couldn't vist with your mom, could you?
A No.
Q Did you miss your mom when she lived in Colorado?
A Yes.
Q Did you want to be with her?
A Yes.
[133] Q When you lived with your mom in Colorado, did Matthew ever come to visit you there, do you remember?
A (No audible response).
Q Did Matthew ever come to Colorado?
A No.
Q Did you miss Matthew when you were in Colorado?
A No.

* * * *

[142] Q When you lived with Matthew were you afraid that you wouldn't see your mom again? Were you ever afraid of that?
A (No audible response.)
Q Have you ever been afraid, Andrea, that something might happen and you wouldn't see your mom again? Ever been afraid of that?
A (No audible response.)
Q Sometimes afraid of that, do you know?
A (No audible response.)
Q Andrea, when you go to court, do you think anything is going to happen to your mom?
A Yes.
Q What do you think is going to happen to her?
A My mom might go to jail.

[143] Q Why do you think that?

A I don't know.

Q Do you think anything is going to happen to Matthew when you go to court? Do you think anything is going to happen to him, do you know?

A (No audible response.)

Q Don't know?

A (No audible response.)

Q Andrea, do you think anything is going to happen to you when you go to court?

A I might go back to my real dad.

Q Are you afraid of that?

A Yes.

* * * *

ARGUMENT OF PROSECUTOR SEEKING ADMISSION OF TESTIMONY OF LISA ROCHA UNDER FED.R.EVID. 801(d)(1)(B)

[164] MS. NEDA: Padilla. Initially Lisa Rocha was offered under rule of evidence 803, 24, under the residual hearsay rule. The Court has been cited some case law on that. However, I believe—

THE COURT: Please face the Court when you are addressing the Court.

MS. NEDA: I'm sorry. However, I believe that another rule is applicable at this point, and that is Rule 801(D)1(b) prior consistent statements, your Honor.

THE COURT: 801(B)1(b).

MS. NEDA: No, (D)1(b). The rule that I am referring this Court to under 801(D)1(b) is prior statement of a witness. There are prior statements made by this witness to which Lisa Rocha, the mother and others can [165] testify, that are consistent with the declarant's testimony, and they are offered to rebut an express or implied charge against this declarant of either recent fabrication, but in this case they're offered to rebut the inference of an improper influence or motive by this child.

And this is arisen in two ways, your Honor. The opening statement of the defense was—the opening words were this case is about false accusations in a custody battle. It's expressed in that, not merely implied or inferred, that the witness was to give false testimony because of a custody battle.

There was also statements in the opening statement by the defense, your Honor, that what this child has been doing is repeating a fairy tale like Goldie Locks, the more she repeats it, the more she believes it.

Therefore, in the opening statement, the expressed statements of the defense were that the child had fabricated or was under improper influence or motive, and therefore, I offer the testimony of the witnesses under that rule. However, the cross-examination of the witness has always opened the door to permit prior consistent testimony—or statements, rather.

And that is that the defense has asked this witness whether she's been spanked by her father and didn't she not like that, and she doesn't want to go back to her [166] father.

Again, she has raised the inference of improper motive. She's asked if she's talked to her mother. Who else she talked to. It raises the inference of improper influence. I believe the opening statement stands on its own and permits prior consistent statement. But I believe the very lengthy cross-examination—I timed the total cross-examination to last an hour and 15 minutes, including Monday.

And I believe that during that very lengthy cross-examination, the door has been opened to permit 801(D)1(b) evidence. In addition to 803, 24, which I did file a notice to permit Lisa Rocha and Kae Ecklebarger to talk to concerning prior statements of the child.

There is case law that I can cite to the Court at this time, should it so desire, permitting 801(D)1(b) testimony to be offered in the case in chief where the cross-

examination has raised either expressly or implicitly improper influence.

* * * *

CROSS-EXAMINATION OF LISA ROCHA
BY DEFENSE COUNSEL
OUT OF PRESENCE OF JURY

[209] Q And that was the full extent of any and all discussions you had with Andrea regarding what took place between her and her father?

A Yes. I have not questioned her any further.

Q And how do you happen to recall that it was the 27th when you had the second discussion with Andrea?

A Because I remember it was on that Monday following that Wednesday when I had talked to her.

Q And Beverly had called you over specifically to discuss this incident and to go through it with Andrea; is that right?

A Beverly told me that Andrea would not speak with her about it and that Andrea said that she would speak to me about it, so she asked me to come over.

Q But it was specifically done to discuss what happened?

A Yeah. She asked me to come over to try to figure out what Andrea had meant, because Andrea would not speak to her at all.

Q And by—Andrea meant by sleeping with her father?

A Excuse me.

Q By my father treated me like a wife, that's what you were going to go in to try and find out—

A I went to go—she didn't say sleeping with my [210] father. She said, My father gets drunk and he thinks I am his wife. That was her statement.

Q And that's what you were going to explore on the 27th?

A I went to go ask her what she meant by that statement.

MR. GANDERT: I have nothing further, your Honor.

THE COURT: Anything further?

MS. NEDA: Not on this hearsay issue, no, sir.

THE COURT: All right. Ms. Rocha, you may step down, and you may wait in the witness waiting room.

(WHEREUPON, witness exited courtroom.)

* * * *

TRIAL COURT RULING ADMITTING
TESTIMONY OF LISA ROCHA
UNDER FED. R. EVID. 801(d)(1)(B)

THE COURT: I'm going to allow the testimony of this witness regarding the August 22nd and August 27th, 1990, conversations with Andrea.

Insofar as the August 22nd statement, I will allow that on alternative grounds, that is, 803, sub 24 and 801(D)1(b). Insofar as allowing her to testify under 803, 24, I'm going to rule at this time that there are circumstantial guarantees of trustworthiness insofar as that statement of Andrea is concerned, in that those circumstances are equivalent to the circumstances which are treated and which permit hearsay statements under 803, sub 3.

[211] These relate to the declarant's existing state of mind, emotion, sensation and so on, relate to motive, a statement which apparently was spontaneous, unsolicited by Ms. Rocha, the baby-sitter, in which the child is asking the aid of a person who apparently she felt was a friend in keeping her or having that person intercede for her with her mother so that she, Andrea, wouldn't have to go to New Mexico to be with her father.

Under 801(D)1(b), I feel that there has been an implied charge that the—that either the declarant was making these statements because of an improper motive, that is because she did not want to be with her father, wanted to be with her mother. And the statements of August the 22nd are consistent with the declarant's testimony and will be admitted to rebut the implied charge of either recent fabrication or improper motive.

Insofar as the August 27th statement is concerned, I'm going to admit that under 801(D)1(b) for the reasons that I have stated insofar as the August 22nd statement is concerned. I don't believe that the August 27th statement qualifies under 803, sub 24.

Okay. That takes care of Ms. Rocha. How long will it take—well, let's see.

* * * *

OBJECTION BY DEFENSE COUNSEL TO COURT'S RULING ADMITTING TESTIMONY OF LISA ROCHA UNDER FED. R. EVID. 801(d)(1)(B)

MS. STEINMETZ: Could I just say something briefly for the record, your Honor?

[212] THE COURT: Sure.

MS. STEINMETZ: Is that when there's a question of motive of a witness or implication of recent fabrication or in this case whether the—who's telling the truth, it seems to me that that's always an issue in a case. And if 801(D)1(b), that is, other statements are allowed to come in because it's just the issue in every single case, then that exception would apply in every single case, and that's not the purpose of the exception.

THE COURT: I'm applying it in this case insofar as Ms. Rocha is concerned.

MS. STEINMETZ: I just want to state that for the record that the issues we have are no different than those in every other case and that there has to be some other reason why that exception applies. Otherwise, the Government, defense, whoever uses that rule can bolster every single statement of every single witness with whatever self-serving statement they want.

* * * *

ARGUMENT OF PROSECUTOR SEEKING ADMISSION OF TESTIMONY OF BEVERLY PADILLA AND TRIAL COURT RULING ADMITTING THAT TESTIMONY UNDER FED. R. EVID. 801(d)(1)(B)

[213] MS. NEDA: I indicated to the Court that most of the testimony of the mother, of Beverly Padilla, is not hearsay, but there is the one statement the mother did overhear while she was in the next room of the apartment.

On August 27th she did hear her child say that her father forced her legs apart. It is not hearsay underneath the Court's ruling 801(D)1(b), but I do bring it to the attention of the Court because she does intend to mention that to the Court.

THE COURT: If she testifies that way, I will admit that testimony as I will admit the testimony of Ms. Rocha under 801(D)1(b).

* * * *

TESTIMONY OF LISA ROCHA, WITNESS ON BEHALF OF GOVERNMENT, DIRECT EXAMINATION

[218] Q All right. And do you recall the month of August 1990, Andrea saying something to you regarding Matthew Tome?

A Yes, I do.

Q Tell us what date that was, to the best of your recollection?

A The 22nd.

Q Of August 1990?

A Yes.

Q And on that day were you baby-sitting Andrea Tome?

A Yes, I was.

Q All right. And what happened during that day?

A She came to me and she told me, Please don't let my mom take my back to my father. And I asked her

why, and she said, Because I don't want to go back. And I asked her [219] why again, and she said, Because my father gets drunk and he thinks I'm his wife.

* * * *

[222] Q So did you talk to Andrea?
A Yes, I did.
Q And what did you say to her?
A I asked her to explain to me what she meant by, my dad thinks I'm his wife.
Q And did she respond?
A Yes, she did.
Q What did she say?
A She said that my father does nasties to me.
Q Did you ask her what that meant?
A Yes, I did.
Q What was her answer?
A She started explaining to me that her father would drag her, drug her through the house by her arms like this, took her into the bedroom and took her clothes off, laid her on the bed. She crossed her legs and that he forced her legs open. He laid on top of her, and she got a sharp pain down towards like her stomach area, and then that she was crying for her mother and her father said, Your [223] mother's a bitch. And then that when he got finished, she got up and she went to the bathroom and she wiped herself and there was blood on the tissue.

* * * *

DISCUSSION OF COURT, PROSECUTOR, AND DEFENSE COUNSEL OF ADMISSIBILITY OF TESTIMONY OF DR. KAREN KUPER AND TRIAL COURT RULING ADMITTING THAT TESTIMONY UNDER FED. R. EVID. 801(d)(1)(B).

[246] MS. NEDA: Dr. Kuper is going to testify to getting the physical, I mean getting the history of the child concerning her complaint. She did an interview of the child, and then she did a physical exam. She will be testifying to both.

THE COURT: What will she—
MS. NEDA: The child was penetrated both digitally by the hand and by the penis, and I have case law.
THE COURT: No, that brings up the question as to whether—
MS. NEDA: Of course, it would also be admissible under 801(B)1—801(D)1(b), but it's under 803, 4.
THE COURT: So insofar as four is concerned, that is 803, 4, should it not be—if it were not admissible under any other exception, shouldn't there be a limiting instruction insofar as the statement of how—of what happened that is to be considered only for purposes of the doctor's opinion in respect to whether or not she was penetrated but to not prove the truth of the fact?
MS. NEDA: Yes.
MS. STEINMETZ: I think the limiting instruction [247] is that it was only taken in the course of a medical history, because I don't think that you can—the doctor can't give an opinion as to the ultimate issue in the case.
THE COURT: No, the ultimate issue in this case is did he abuse her sexually. Now, she says that he penetrated her digitally and otherwise. Should that—that's medical history that the doctor takes.
MS. STEINMETZ: Right, medical history.
THE COURT: Should there not be a limiting instruction as to that, in other words, that the medical history can be considered only for the purpose of not proving that he penetrated her digitally and otherwise, but only for the purpose of establishing foundation for his opinion that she was in fact penetrated.
MS. NEDA: The answer is yes, your Honor. However, this testimony is also offered under the prior consistent statement which is—
THE COURT: 801(D)1(b), dog, boy.
MS. NEDA: That's right. I have to get that straight. In that case it's not hearsay, but should I offer it solely under 803, 4, the Court is correct, the responses during the course of the interview were not offered for the truth

of their content. However, it's being offered as non-hearsay under 801(D)1(b).

THE COURT: How do we handle that before the [248] jury? I am inclined to go along with you on 801(D)1(b).

MS. STEINMETZ: We're in the same position we were before, Judge, is that what they are offering it for is to bolster the credibility given in court, and they are saying it's a prior consistent statement. They are saying it's a prior statement, it's consistent with what she said in court.

THE COURT: I wouldn't admit it under 801 if you hadn't thrust in that direction, that is recent fabrication or improve motive, and that is implied in the manner in which you conducted your examination.

MS. STEINMETZ: But that's the issue in every single case.

THE COURT: Well, I'm going to admit it under 801(D)1(b), and I don't know what we should do about a limiting instruction under 803, 4.

MS. NEDA: I would offer it so that we can offer it under 801(D)1(b) non-hearsay.

MS. STEINMETZ: I still have the confrontation clause issue under *Idaho versus Wright*, and the trustworthiness giving a statement, I'll just say that for the objection.

(WHEREUPON, bench conference concluded.)

* * * *

TESTIMONY OF DR. KAREN KUPER,
WITNESS ON BEHALF OF GOVERNMENT,
DIRECT EXAMINATION

[255] Q Would you please state precisely the question you asked of the child and the answer she would give and just go in chronological order that the interview was conducted?

A Certainly. I always begin with a very open-ended question, and my question was, Has anyone ever touched you in a way that hurt or was scary and her answer was, Just my dad. I then asked, What did he do? Andrea said, He touched me.

And I asked where. And Andrea said, Here. She was holding a doll that we have in our play room, and she was pointing to the vaginal area on the doll.

I then said, What did he do? Andrea said, He put his fingers inside me. I said, How did it feel? And she said, It hurt and I was scared.

[256] I then said, Did he touch you with anything else? Andrea said, His thing. I said what, Do you mean "his thing?" She again could not tell me what his thing was, but she again had the dolls and she pointed to the doll's genital area.

I then asked her, What did he do with his thing? And Andrea said, He put it inside of me. I asked where, and she then pointed to the doll's vaginal area.

Q After you conducted this interview of the child—well, let me ask you first. Was the mother present during the interview of this child?

A Yes, she was.

Q And where was she while you were talking to the child?

A She was in the same room. Andrea was lying on the exam table. Her mother was sitting behind me in one of the chairs in the room.

* * * *

TESTIMONY OF DR. LAURA REICH,
WITNESS ON BEHALF OF GOVERNMENT,
DIRECT EXAMINATION

[291] Q Dr. Reich, after you asked the child concerning personal history, did the child respond in any way to you?

A Yes. She was extremely open with me through the entire exam and pre-exam, very calm, and told—

THE COURT: Just a moment.

MS. STEINMETZ: I'm sorry, your Honor. For the record, I have to just state I have the same objections that I had to the previous doctor that testified as to this witness also.

THE COURT: All right, let's proceed.

BY MS. NEDA:

Q Would you start that answer again.

[292] A Yes. She was extremely open. She was extremely calm during the examination and very friendly and said that her father had put his thing in her.

Q Did you go into the interview any further than that?

A No. She and her mother had said that—well, she said she talked to others about it. I asked her if she had talked to others, and she said yes. And her mother said that they talked—that social services had been involved, that they had seen Dr. Kuper a few days previously and that she had also talked to her.

And so I felt at that point that the child had been through enough in terms of discussing it and that what was important for me was to examine her at that point.

* * * *

TESTIMONY OF KAE ECKLEBARGER,
WITNESS ON BEHALF OF GOVERNMENT,
DIRECT EXAMINATION

[317] Q Now, tell us what she told you Matthew did to her in detail?

A She told me, to quote, that he had, quote, put his balls in her.

MS. STEINMETZ: Excuse me. I'm sorry, Ms. Ecklebarger. I have to object for the record to this hearsay part. I think I have to do that at this point, your Honor.

THE COURT: All right. Overruled. Let's proceed, go ahead.

BY MS. NEDA:

Q I'm sorry, Ms. Ecklebarger, please continue.

A She stated that he had, and in her words were, quote, put his balls in me, end quote. I at that point asked her where this had happened, and she said that it had happened at her grandma Sadie's house where she and Matthew were with her grandma and grandpa and that her aunty Sheba [318] also lived there.

She specified that none of the other three adults were home during the incident that we were going to talk about. And I had asked her if she could remember, you know, one specific times that we were talking about. We were talking about one incident, and she said that she could remember this one time especially clearly.

And she went on to describe to me that he had told her to take her clothes off. That she had told him no. That he then removed her panties and put her down on the floor and that he had put his balls in her.

At that time I brought the anatomical dolls out and asked her if she could show me with the dolls what he had done. She undressed the male doll and took the panties off of the little girl doll, and then she placed the little girl doll down on its back, put the male adult doll on top of it. Took the penis of the male adult doll and attempted to insert it into the little girl doll and was moving the doll upside down.

She then began—she was reaching down—

Q Let me stop you. Where did the child place the penis?

A In the vagina area of the little girl doll.

Q All right. And you said she moved the doll. How did she move the doll?

[319] A She moved the male doll up and down on top of the female doll.

Q All right. Go ahead.

A Where was I? She then—she was then—she had reached down and was doing something with the legs of the little girl doll. And I said, What are you doing? And

she was trying to cross them and keep them crossed, and she was taking the hand of the male doll and trying to shove the legs apart. And she got frustrated and she said, I tried to keep my legs closed so he couldn't put his balls in me.

And then she kind of pushed the dolls away and laid down on the floor, and she put her legs out straight and crossed them and said, I had any legs out crossed like this. And then she said when she grabbed them, she said she reached and grabbed her own ankles and pulled them apart and then pulled her ankles up to her buttocks so her knees were in the air and then pushed her knees apart and said, and then he did this and then he put his balls in me.

Q Did Andrea tell you whether or not Matthew kissed her?

A Yeah. She said that he kissed her all over her body and that specifically he kissed her on the vaginal area. She pointed to that area of the doll. She also said that he had asked her to touch him and that she had refused. When I asked her where he had asked her to touch [320] him, she pointed or she touched the penis area on the male doll.

Q Did Andrea tell you what she did after Matthew did this to her?

A Yes. She said that afterwards she had gone to the bathroom, and that when she had wiped herself, that there was blood on it. And that she had kept that and that when her grandmother and aunty came home, that she went and showed them and said, Look what Matthew did to me.

And she said at that point that her grandmother had said, If he does it again, I'm going to haul him away. She said later that her grandmother confronted Matthew and that she was there and that Matthew turned to Andrea and said, It's all your fault. And Andrea said, No, it isn't, it's all your fault.

* * * *

[326] Q Ms. Ecklebarger, did the child Andrea Tome tell you that Matthew did this more than once?

A Yes, she did.

Q What were her words?

A Well, what she said was—I had asked her what had made him stop. It was after she had talked about grandma saying that if he did it again, that she would have him hauled away. And she said, Well, grandma said that she would have him hauled about, but he didn't stop, he did it every single day and then he stopped.

* * * *

TESTIMONY OF BEVERLY PADILLA, WITNESS ON BEHALF OF GOVERNMENT, DIRECT EXAMINATION

[406] Q And after you talked to Lisa Rocha on the telephone, did you try to talk to your daughter that time?

A Yes.

Q And would your daughter talk to you?

A No.

Q What did she do?

A That Monday she told me to ask me what she meant by when her father got drunk and thought of her as his wife, [407] and she just stood there and said nasties and I asked her, "What do you mean by nasties?"

MR. GANDERT: Your Honor, I object to hearsay.

THE COURT: Overruled. Go ahead.

A And I told her to explain to me what she meant and she didn't want to tell me. She just started crying and so I said, "If you won't tell me, would you tell Lisa?" And she said, "Yeah."

* * * *

[408] Q So did Andrea talk to Lisa Rocha?

A Yes, she did.

Q And do you remember hearing anything that Andrea said?

A The—

MR. GANDERT: Your Honor, I object. I believe this is hearsay.

THE COURT: Overruled.

BY MS. NEDA:

Q Do remember anything that your daughter said to Lisa Rocha?

A Only pulling her legs apart when her dad was trying to pull it open.

* * * *

TESTIMONY OF DR. JEAN SPIEGEL,
WITNESS ON BEHALF OF GOVERNMENT,
RE-DIRECT EXAMINATION

[509] Q What did she tell you?

A She didn't volunteer any information.

Q Did she tell you anything at all?

A I had to directly ask her.

Q What did you ask her?

A She was very shy and quiet and I asked her where her body was touched.

Q Did she indicate it?

A Yes, she said that her breasts were touched and her front privates were touched, and she also told me that her bottom where her poop comes out was touched.

* * * *

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 92-2104

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MATTHEW WAYNE TOME,
Defendant-Appellant.

Aug. 26, 1993

Before ANDERSON, HOLLOWAY, and TACHA, Circuit Judges.

TACHA, Circuit Judge.

Matthew Wayne Tome ("Tome"), a Native American residing on the Navajo Indian Reservation in New Mexico, was convicted of aggravated sexual abuse in violation of 18 U.S.C. §§ 1153, 2241(c), and 2245(2)(A), (B). Mr. Tome appeals his conviction, challenging the admission of certain hearsay testimony and the government's use of leading questions. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Background

A.T. is the daughter of the defendant and his ex-wife, Beverly Padilla. A.T. was born on June 18, 1985. Tome and Padilla divorced in September 1988. The Navajo Tribal Court awarded Tome and Padilla joint custody of

A.T. but granted Tome primary physical custody. From September 1988 until May 1989, Tome had custody of A.T. on weekdays while Padilla had custody on weekends. Tome and Padilla alternated custody of A.T. every two weeks during the summer of 1989, with Padilla having custody from June 16 to June 30, 1989.

In August 1989, Padilla petitioned the Navajo Tribal Court for primary custody of A.T. The Tribal Court denied the petition but awarded Padilla custody during the summer of 1990. At this time, Padilla had remarried and was living in Colorado. A follow-up custody hearing was scheduled for August 24, 1990. Padilla and A.T., however, did not attend that hearing. Rather, on August 27, 1990, Padilla contacted Colorado authorities with allegations that A.T. had been sexually abused by her father, Tome. On August 22, 1991, a superseding indictment charged Tome with knowingly engaging in sexual acts with his daughter, an Indian child under the age of twelve, in violation of 18 U.S.C. § 1153, 2241(c) and 2245(2)(A), (B). In a Bill of Particulars filed September 10, 1991, the government alleged that the conduct in question occurred on or about June 18, 1989, when A.T. was four years old. Tome's trial began on February 24, 1992.

The government called A.T. as its first witness. She was six and one-half years old at the time of trial. After the court extensively questioned A.T. concerning her ability to distinguish the truth from a lie, she testified before the jury. On direct examination, her testimony consisted mostly of one and two-word answers. In addition, the trial judge permitted the prosecutor to use leading questions to develop A.T.'s testimony pertaining to the alleged sexual abuse. The prosecutor asked mainly "yes or no" questions and also had A.T. demonstrate details of the abuse by using dolls and having A.T. point to parts of the prosecutor's body. Through these means, A.T. testified that Tome removed her clothes, got on top

of her, and put his private place where she goes potty and in her mouth. She further testified that after this happened she went to the bathroom and wiped blood off herself with a tissue.

A.T.'s cross-examination occurred over two days, beginning on a Monday afternoon and resuming the following Wednesday morning. On the first day, defense counsel covered numerous topics all unrelated to the alleged abuse. She first established that A.T. knew the prosecutor on a first-name basis but did not know the judge or any of the defense counsel. She then questioned A.T. about the difference between living with her father in New Mexico and her mother in Colorado, focusing on the reasons she might have for wanting to live with her mother. A.T.'s responses to these question on the first day were immediate and ranged from single word responses to complete and relatively detailed sentences.

When A.T.'s cross-examination resumed two days later, it was strained. Almost from the start, when defense counsel asked A.T. about any conversations she had had with the prosecutor on Tuesday, A.T. often provided no audible response. Defense counsel then asked A.T. if she missed her mother when staying in New Mexico and asked her what she thought might happen to her or her mother when they went to court. A.T. testified that she did miss her mother and that she thought that she would be returned to her father while her mother went to jail. After a recess, defense counsel asked A.T. whether she had discussed the alleged abuse with anyone besides the prosecutor and, if so, whether she knew the occupations of those persons. A.T. testified to discussing the matter with several physicians and social workers and stated that their jobs were "to help kids." On recross-examintion, when A.T. was asked to describe her testimony on direct examination, she answered that it was "the truth." Defense counsel chose not to ask A.T. about the details of the alleged sexual abuse.

The government also produced several witnesses who testified about statements A.T. made to them. The first witness was Lisa Rocha, A.T.'s baby-sitter and a close friend of A.T.'s mother. Rocha testified that, while she was baby-sitting A.T. on August 22, 1990, A.T. spontaneously told her, "Please don't let my mom take me back to my father." Rocha testified that, when asked why, A.T. remarked that her "father gets drunk and he thinks I'm his wife." Rocha told Padilla about this incident five days later, on August 27, 1990, at which time she and Padilla attempted to question A.T. further about her accusations. When A.T. would not speak with her mother. Padilla left the room. Rocha testified that A.T. said that her father "does nasties to me," which consisted of taking her clothes off, forcing her legs open, and causing a sharp pain in her stomach when he laid on top of her. Finally, Rocha testified that A.T. related going to the bathroom and wiping blood off herself with a tissue.

Next to testify for the prosecution was Dr. Karen Kuper, a pediatrician in Colorado Springs. Kuper testified that Kae Ecklebarger, a Child Protection Service's caseworker, referred A.T. to her office. Kuper examined A.T. on two occasions in September and October 1990. As part of A.T.'s examination, Kuper interviewed her using anatomically correct dolls. Kuper testified that A.T. told her that her father hurt and scared her by putting his fingers and his "thing" in her vagina. When asked what his "thing" was, A.T. pointed to the doll's genital area. Kuper also testified that A.T. had an enlarged vaginal opening and an abnormally thin rim of hymenal tissue, and that these physical characteristics were consistent with vaginal penetration.

The testimony of Dr. Laura Reich, Chief of Pediatrics at the El Pomar Community Health Center in Colorado Springs, followed. Reich examined and interviewed A.T. on September 21, 1990. Reich testified that A.T. said that "her father had put his thing in her." Reich further

testified that A.T.'s hymen was not intact, that her vaginal opening was larger than normal, and that she had an extensive vaginal rash. Reich also testified that A.T.'s physical characteristics were consistent with vaginal penetration.

The government's next witness was Kae Ecklebarger, who was a caseworker in the Colorado Springs Child Protection Services office at the time she interviewed A.T. on August 29, 1990. Ecklebarger testified that A.T. said that her father removed her panties, put her down on the floor, and "put his balls" in her. Ecklebarger stated that A.T. demonstrated intercourse with anatomically correct dolls, attempting to insert the male doll's penis into the female doll and moving the male doll up and down on top of the female doll. Eckelbarger further testified that A.T. stated that her father kissed her on her vaginal area and asked her to touch his penis. Finally, Ecklebarger testified that A.T. said that she wiped blood from herself with a tissue, kept the tissue, and later showed it to her grandmother, saying, "Look what Matthew did to me."

A.T.'s mother, Beverly Padilla, also testified for the government. She stated that she was in the next room when Rocha was talking to A.T. on August 27, 1990. Padilla testified that she heard A.T. tell Rocha about her father pulling her legs apart.

The final witness to relate A.T.'s out-of-court statements was Dr. Jean Spiegel, a pediatrician at the University of New Mexico. Spiegel examined A.T. on September 3, 1991, when A.T. was six years old and almost two years after the abuse allegedly occurred. Spiegel testified that A.T.'s vaginal opening was abnormally large and that she had very little hymen left. She stated that these physical characteristics were consistent with chronic vaginal penetration. On redirect examination, Spiegel testified that A.T. stated that her father touched her breasts, her "front privates," and "her bottom where her poop comes out."

On March 3, 1992, after Tome testified and presented his own evidence and witnesses, the jury convicted him on all counts. On appeal, Tome alleges the following errors: (1) the admission of alleged hearsay testimony in violation of the Federal Rules of Evidence and the Sixth Amendment's Confrontation Clause; (2) the improper use of leading questions to elicit A.T.'s testimony on direct examination; and (3) cumulative error and a fundamentally unfair trial.

II. A.T.'s Out-of-Court Statements

Tome challenges the testimony of six witnesses concerning A.T.'s out-of-court statements to them: Rocha, Ecklebarger, Padilla, Kuper, Reich, and Spiegel. In our analysis, we address whether the trial court properly admitted the testimony under the Federal Rules of Evidence and, if so, whether that testimony nevertheless violated Tome's rights under the Confrontation Clause.

A. *Federal Rules of Evidence*

The decision to admit evidence is within the sound discretion of the district court. *United States v. Zimmerman,* 943 F.2d 1204, 1211 (10th Cir.1991). We accord heightened deference to the trial court's hearsay rulings. *See United States v. Johnson,* 971 F.2d 562, 571 (10th Cir.1992).

The government proffered the challenged testimony of everyone but Ecklebarger as not hearsay under Fed.R. Evid. 801(d)(1)(B), contending that the defense had implied, during its cross-examination of A.T., that she had fabricated the allegations of abuse in order to live with her mother in Colorado.[1] The government also contended

[1] Rule 801 defines as hearsay "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). The Rule further provides that a witness's prior statement

that, even if the proffered testimony were hearsay, it all fell within one of two hearsay exceptions. The government offered the testimony of Doctors Kuper, Reich, and Spiegel under Fed.R.Evid. 803(4) as statements made for the purpose of medical diagnosis or treatment and the testimony of Rocha, Padilla, and Ecklebarger under Rule 803(24)'s "catch-all" exception as having adequate circumstantial guarantees of trustworthiness. We conclude that the testimony of all six witnesses[2] was admissable as not hearsay under Rule 801(d)(1)(B) and therefore do not address the Rule 803 hearsay exceptions.

Under Rule 801(d)(1)(B), evidence of a witness's prior consistent statement is not hearsay if the witness is subject to cross-examination concerning his prior statement and it is offered to rebut an express or implied charge of recent fabrication or improper motive. *See United States v. Sutton,* 732 F.2d 1483, 1493-94 (10th Cir.1984), *cert. denied,* 469 U.S. 1157, 105 S.Ct. 903, 83 L.Ed.2d 919 (1985). Tome contests the admission of the statements under Rule 801(d)(1)(B) on the grounds that (1) A.T. was not "subject to cross-examination concerning the statement," (2) defense counsel's attempt to cross-examine A.T. did not amount to a charge of recent fabrication or improper motive, and (3) the statements did not fall within the proper scope of the rule because they were made after the declarant had a motive to lie.

is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *Id.* Rule 801(d)(1)(B).

[2] Although the applicability of Rule 801(d)(1)(B) was a recurring evidentiary issue, the government failed to expressly offer Ecklebarger's testimony as nonhearsay under the rule. This court, however, "is not bound by the evidentiary basis relied upon by the trial court for the admission of the challenged evidence." *Fortier v. Dona Anna Plaza Partners,* 747 F.2d 1324, 1331 (10th Cir. 1984).

(1) Subject to Cross-Examination

We first address Tome's contention that A.T. was not subject to cross-examination as required by the rule because she was unresponsive to certain questions. The Supreme Court addressed Rule 801's cross-examination requirement in *United States v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988), which involved a prison officer who suffered severe memory impairment after he was attacked and beaten with a metal pipe. *Id.* at 556, 108 S.Ct. at 841. The officer identified his assailant to an FBI agent. At the assailant's trial, however, the officer testified that, while he remembered identifying the assailant, he could not now remember seeing his attacker. *Id.* The court examined the testimony under Rule 801(d)(1)(C), which has the same cross-examination requirement as Rule 801(d)(1)(B). In what it deemed "the more natural" reading of the cross-examination requirement, the Court stated that "[o]rdinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." *Id.* at 561, 108 S.Ct. at 844. The Court then concluded that the witness was subject to cross-examination notwithstanding his forgetfulness because he answered questions regarding his prior statements and the factfinder could evaluate his prior statements in light of his present inability to remember the factual basis underlying them. *Id.* at 562, 108 S.Ct. at 844.

We first note that the Rule 801(d)(1) standard is not identical to that contained in the Sixth Amendment's Confrontation Clause. *See United States v. DiCaro*, 772 F.2d 1314, 1325 (7th Cir.1985) (citing *Dutton v. Evans*, 400 U.S. 74, 86, 91 S.Ct. 210, 218, 27 L.Ed.2d 213 (1970)), *cert. denied*, 475 U.S. 1081, 106 S.Ct. 1458, 89 L.Ed.2d 716 (1986). The Confrontation Clause, which we discuss below, protects the accused's right to "an opportunity for effective cross-examination." *See Owens*, 484 U.S. at 559, 108 S.Ct. at 842. In contrast, Rule 801(d)(1) requires

that the witness be subject to cross-examination concerning the prior consistent statement only. The Rule does not require cross-examination concerning the events underlying the statement or the matter asserted therein. *See* 4 David W. Louisell & Christopher B. Mueller, *Federal Evidence* § 419, at 179-80 (1980).

A.T. testified at trial and answered questions on cross-examination. Over the course of two days, the defense asked A.T. approximately 348 questions on cross-examination, covering nearly fifty-one pages of trial transcript. On the first day, A.T. answered all of the questions posed to her, all of which were background questions or otherwise not directly related to her allegations of abuse.

Cross-examination on the second day was more difficult. The defense asked about 249 questions, approximately sixty-six of which elicited no audible or discernible response. Defense counsel began by asking A.T. about her meetings with the prosecutor on Tuesday, the day between her first and second days of cross-examination. A.T. acknowledged that she met with the prosecutor for a short period of time but was very reluctant to discuss the content of those conversations, generally stating that she did not remember the specific things they talked about. Except for a few questions about her conversations with the prosecutor, however, A.T. eventually responded to the substance of all of the defense's inquiries.[8]

Thereafter, defense counsel began asking A.T. about her allegations of abuse. After a few questions, the dis-

[8] We note that when A.T. initially failed to respond, the questions often concerned seemingly irrelevant material. For example, the record contains a series of eight questions about whether A.T. ever helped her grandfather care for his sheep. Five of those questions yielded no audible response; the other three established that A.T. could not remember helping to take care of her grandfather's sheep.

trict court called for a recess and made observations on the record about A.T.'s testimony on cross-examination.[4] When questioning resumed, defense counsel asked A.T. many questions about to whom she may have mentioned the abuse, and A.T. answered all but a few of those questions. Her answers ranged from specifically acknowledging or denying making certain statements to claims of forgetfulness. Although she failed to respond initially to this line of questioning, it often was the result of imprecise cross-examination. For example, defense counsel asked A.T. four times whether she remembered talking to a counselor, and four times failed to elicit an audible response, before learning that A.T. did not know what a counselor was. At one time, the court admonished de-

[4] The court stated:

> The record should reflect that when questions are asked of this witness, the questions which she has answered, that the answers are given reasonably quickly, that is within two, three or four seconds in most cases.
>
> But in many cases where a question is asked and the witness does not respond, she has not responded except—excuse me. It has—integrals [sic] of time have elapsed between the time that the question is finished until the next question is asked of up to as much as 45 or 50 seconds.
>
> I don't know what the reason for that is of the witness' inability to comprehend. I sense that some questions are in that category, but there are other questions that appear to be rather simple questions, and the witness nevertheless has not responded and has waited for the next question as much as, as I say, 40, 45 second, many times 20 seconds, 25 seconds. And I've been timing that with my watch.
>
> * * * *
>
> We have a very unusual situation insofar as this witness is concerned. I would note also on the record that when we started this recess, the witness seemed to be losing concentration. She would look up to the ceiling, would look to the back of the courtroom, she would look over my head, would not in instances face counsel who is inquiring of her.
>
> She twisted and turned, stretched a little bit sometimes. At other times she would put her hand to her mouth and clasp her lips with her hand. We have a very difficult situation here.

fense counsel, suggesting that the questions might be too complicated for the six- and one-half-year-old witness.

We are mindful that Rule 801's cross-examination requirement "should not be viewed as an empty formalism which can be satisfied by the mere fact that the witness is present and can be required to sit still long enough for questions to be put." *Id.* at 181. Nevertheless, we conclude that A.T. was subject to cross-examination concerning her prior statements alleging abuse. Although A.T. was reluctant to answer some questions and testified that she did not remember making certain statements, she did ultimately answer most of defense counsel's questions. Our reading of the record reveals that A.T. responded to simple and specific questions about specific persons. Indeed, Tome does not identify any specific topic or issue that he feels was important but about which A.T. would not respond. In short, A.T. did willingly respond to Tome's inquiries on cross-examination.

In addition, where the witness answers numerous questions regarding the prior statements, all of the purposes of cross-examination are served. Cross-examination under oath insures that the factfinder can observe the witness's demeanor while responding to questions in a formal setting. It also enables the defense to probe the circumstances under which the statement was made in order to call into question the accuracy or sincerity of the earlier statement. Those conditions clearly resulted from Tome's cross-examination in this case. Moreover, when the child witness answers some but not all of the questions, the factfinder may have an even greater insight into the witness because it can observe the witness's demeanor while both answering and remaining silent. Under these circumstances, we find that A.T.'s general responsiveness and the jury's ability to observe her demeanor on the stand made her "subject to cross-examination" for purposes of Rule 801.

(2) Implied Charge of Recent Fabrication

Tome next contends that Rule 801 was not applicable because defense counsel did not charge A.T. with recent fabrication or improper motive. It is true that "not every attempt to impeach a witness's credibility constitutes a charge of fabrication." *Gaines v. Walker*, 986 F.2d 1438, 1444 (D.C.Cir. 1993); *see also United States v. Cherry*, 938 F.2d 748, 755 (7th Cir.1991). The trial court has discretion, however, to determine whether the prior consistent statement is offered for such a purpose. *See United States v. Herring*, 582 F.2d 535, 541 (10th Cir.1978); *see also United States v. Montague*, 958 F.2d 1094, 1098 (D.C.Cir.1992).

In this case, the defense's questions on cross-examination clearly implied that A.T. had fabricated the allegations of abuse out of a desire to live with her mother. Defense counsel questioned A.T. at length regarding her preference for living with her mother. A.T. testified that she had friends in Colorado but none in New Mexico, and that she missed her mother when in New Mexico but did not miss her father when in Colorado. Because this line of questioning attacked more than her general credibility or memory, we find that the district court did not abuse its discretion in concluding that the defense had impliedly charged A.T. with fabricating the abuse. *See United States v. Red Feather*, 865 F.2d 169, 171 (8th Cir.1989) (applying Rule 801(d)(1)(B) where defendant implied on cross-examination that child sexual abuse victim was coached by social services counselors and was prejudiced against her father because of prior punishment and discipline); *see also State v. Newman*, 242 Mont. 315, 790 P.2d 971, 975 (1990) (applying state version of Rule 801 where defense repeatedly referred to child sexual abuse victim's possible motives for falsely accusing defendant).

(3) The Pre-motive Rule

Finally, Tome contends that Rule 801(d)(1)(B) does not apply because all of the prior statements were made after A.T.'s alleged motive to fabricate a story of abuse arose. Whether the rule includes such a limitation is an issue of first impression in this circuit.[5] The proper interpretation of the rule is a question of law which we review de novo.

While we have not yet had occasion to decide this issue, it has divided the other circuits for years. Although the text of the rule is silent on this point, some circuits require that the declarant's prior consistent statement precede the time that the alleged motive to lie arose. *See, e.g., United States v. Guevera*, 598 F.2d 1094, 1100 (7th Cir. 1979); *United States v. Quinto*, 582 F.2d 224, 234 (2d Cir.1978). Other circuits reject the so-called "pre-motive rule" and do not require the prior consistent statement to precede the alleged motive to lie. *See, e.g., Montague*, 958 F.2d at 1098; *United States v. Pendas-Martinez*, 845 F.2d 938, 942 n. 6 (11th Cir.1988); *United States v. Parry*, 649 F.2d 292, 296 (5th Cir. Unit B, June 1981).[6] We too reject the pre-motive rule and

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[5] The government contends that this circuit rejected the pre-motive rule in *United States v. Rios*, 611 F.2d 1335 (10th Cir. 1979). *cert. denied*, 452 U.S. 918, 101 S.Ct. 3054, 69 L.Ed.2d 422 (1981). The pre-motive rule, however, was not at issue in that case. Rather, *Rios* involved the use of prior consistent statements to counteract the defense's cross-examination regarding the witness's prior inconsistent statement. *Id.* at 1349. The issue was whether the prior consistent statement had to precede the prior inconsistent statement; we said no. *Id.* While discussing the "order" of certain evidence under the Rule, we did not discuss the witness's motives at the time of making the earlier statements.

[6] Because the government offered the statements for their full substantive effect, we do not examine the applicability or interpretation of Rule 801(d)(1)(B) with respect to statements offered only to rehabilitate the live testimony. *See United States v. Casoni*, 950 F.2d 893, 905 (3rd Cir.1991).

decline Tome's invitation to limit Rule 801(d)(1)(B)'s scope to statements made prior to the existence of the declarant's motive to fabricate.

Those courts that have adopted the premotive rule reason that prior consistent statements are "of no probative value to rebut an allegation of recent fabrication when the declarant's motive in making both statements was the same for the simple reason that mere repetition does not imply veracity." *United States v. Harris*, 761 F.2d 394, 399 (7th Cir.1985) (internal quotation omitted). This may be true. As articulated, however, the pre-motive requirement is a function of the relevancy rules, not the hearsay rules. *See Montague*, 958 F.2d at 1098; *United States v. Miller*, 874 F.2d 1255, 1272 (9th Cir.1989). But even as a function of relevance, the pre-motive rule is clearly too broad: a per se rule is untenable because it is simply not true that an individual with a motive to lie always will do so. Rather, the relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie.[7]

In rejecting the pre-motive rule, however, we do not overlook or devalue the veracity concerns which underlie the rule. To the contrary, we recognize that prior consistent statements made after a strong motive to lie has arisen may evidence only that the declarant is a consistent liar. To determine whether a statement has probative value apart from its repetition, we follow the approach taken by the Ninth Circuit in *Miller*.[8] *Miller* treats a de-

[7] Indeed, courts that have adopted the pre-motive rule appear to factor such information into the equation when determining whether a sufficient motive to lie arose. *See, e.g., Cherry*, 938 F.2d at 756.

[8] The statements at issue in *Miller* were offered only to rehabilitate the trial witness's testimony, not for the truth of the matter asserted. 874 F.2d at 1272. The court, however, held that the standards for admission under Rule 801(d)(1)(B) are the same whether the evidence is offered substantively or for rehabilitation. *Id.* at 1273. The analysis, therefore, applies equally to the admission of prior statements as substantive evidence.

clarant's motive to lie as only one factor—albeit a crucial one—to be considered when evaluating the relevancy of a prior consistent statement under Federal Rules of Evidence 402 and 403. *Id.* at 1274. In doing so, "the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant 'probative force bearing on credibility apart from mere repetition.'" *Id.* (quoting *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir.1986)).

In *Miller*, the court applied this test to the out-of-court statements of two witnesses. The case involved the espionage prosecution of Richard Miller, an agent for the Federal Bureau of Investigation who delivered classified documents to two emigrees from the Soviet Union, Svetlana and Nikolay Ogorodonikova. Svetlana testified during Miller's trial that Miller had never shown or given her a classified document. When the government attempted to impeach that testimony, Miller sought to rehabilitate her testimony through evidence of seven prior consistent statements made by Svetlana. After rejecting a strict pre-motive requirement, the court affirmed the exclusion of the statements. The court found that, because all of them were made to federal agents or defense attorneys while she was under criminal investigation or indictment, her motive to fabricate was "powerful," thus stripping the "self-serving" statements of "any significant probative value." *Id.* at 1274.

In contrast, the court affirmed the admission of prior consistent statements made by Marta York, a government witness and Miller's ex-lover. York testified that Miller had told her that he had given one classified document to his "Soviet girlfriend." *Id.* at 1275. When the defense attacked that testimony on cross-examination, the govern-

ment sought to rehabilitate her testimony by introducing evidence that she had repeated Miller's claim to a friend. The defense contended that the prior consistent statement was not relevant because York was upset about her broken love affair with Miller and thus had a motive to lie. *Id.* The court found that the prior statement, which was made spontaneously, was subject to only a speculative motive to fabricate and had enough probative value independent of its consistency with the witness's trial testimony to be presented to a jury. *Id.* Similarly, in *United States v. Payne*, 944 F.2d 1458, 1471 (9th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1598, 118 L.Ed.2d 313 (1992), the court addressed the admissibility under Rule 801(d)(1)(B) of prior consistent statements made by a sexually abused foster child. The defense argued that the victim "may have been angry" at the defendant and therefore "falsely accused him for revenge." *Id.* at 1471 n. 12. The court, however, affirmed the admission of the prior consistent statements, finding that the alleged motive to lie was too speculative. *Id.* at 1471.

Applying this analysis to the present case, we conclude that the district court properly admitted evidence of A.T.'s prior consistent statements under Rule 801(d)(1)(B). The record reveals that A.T. spontaneously made her initial allegation of abuse to her baby-sitter. On cross-examination, Tome implied that A.T. fabricated the allegations about her father because she wanted to live with her mother. Although this argument does present some motive to lie, we do not believe that it is a particularly strong one. *See Payne*, 944 F.2d at 1471. Moreover, Tome's contention would require us to believe that A.T.'s statements were the result of a calculated scheme to deceive. Yet Tome has presented no evidence that the five-year old A.T. possessed the ability to appreciate the causal relationships inherent in the conception and implementation of such a scheme. *See id.; see also State v. Robinson*, 611 A.2d 852, 858 (Vt.1992) (finding defense's claim that child fabricated story of sexual abuse because of attention he received from it highly speculative). Under these circumstances, we believe that A.T.'s consistent statements do carry probative force apart from mere repetition.[9] We therefore find no abuse of discretion in admitting these prior consistent statements.[10]

B. *Confrontation Clause*

Tome contends that, even if the testimony concerning A.T.'s out-of-court statements was admissible under the Federal Rules of Evidence, its admission nevertheless violated his constitutional rights under the Sixth Amendment's Confrontation Clause.[11] We review claims under the Confrontation Clause de novo. *See United States v. Ellzey*, 936 F.2d 492, 495 (10th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 400, 116 L.Ed.2d 350 (1991).

"The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987). Although an out-of-court statement related by a witness at trial constitutes "testimony" against the accused, "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant

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[9] We do not decide whether this result would obtain where the defendant presents evidence of "coaching" by a parent or relative. Although Tome makes stray accusations that A.T.'s mother coached A.T. into making these statements, he does not rely on that argument and cites no evidence in the record in support of that assertion.

[10] Tome did not object that the admission of *all* of these statements together rendered them more prejudicial than probative under Fed.R.Evid. 403, and we find no plain error.

[11] The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

is testifying as a witness and subject to full and effective cross-examination." *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970). Here, the out-of-court declarant, A.T., was physically present on the witness stand for cross-examination. Tome contends, however, that his right to conduct cross-examination was violated because the witness did not respond sufficiently to his questions. We disagree.

It is clear that "simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns." *United States v. Spotted War Bonnett*, 933 F.2d 1471, 1474 (8th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1187, 117 L.Ed.2d 429 (1992); *see United States v. Dorian*, 803 F.2d 1439, 1446 (8th Cir.1986) (concluding that five-year-old witness was unable to testify meaningfully because of age and fright); *see also Commonwealth v. Kirouac*, 405 Mass. 557, 542 N.E.2d 270, 272-74 (1989) (witness resisted answering nearly all questions asked during cross-examination). Ours is not, however, a situation where the child witness was unable to answer questions on the stand. Rather, as discussed above, the record includes fifty-eight transcript pages of A.T.'s cross-examination during which she was generally responsive. Tome nevertheless challenges the sufficiency of the cross-examination because, in response to a number of questions, A.T. either gave no audible response or testified that she could not remember many things.

The Confrontation Clause "guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985). The concerns animating the Confrontation Clause are satisfied as long as the defendant has the opportuninty to expose weaknesses in the witness' testimony. *See Owens*, 484 U.S. at 559, 108 S.Ct. at 842; *see also Kentucky v. Stincer*, 482 U.S. 730, 744, 107 S.Ct. 2658, 2667, 96

L.Ed.2d 631 (1987). Forgetfulness, for example, does not render cross-examination constitutionally infirm because the defense can use the witness's poor memory and trial demeanor to attack the witness's credibility. *Owens*, 484 U.S. at 559-60, 108 S.Ct. at 842-43; *Fensterer*, 474 U.S. at 20, 106 S.Ct. at 295. In this case, the defendant likewise had the opportunity to mount a successful attack against the partially nonresponsive witness and, in fact, rarely missed an opportunity to comment on the difference between A.T.'s testimony on direct and on cross-examination. Therefore, notwithstanding A.T.'s failure to respond to some questions on cross-examination, we find that Tome's rights under the Confrontation Clause were not violated because A.T.'s testimony provided him a sufficient opportunity to discredit her out-of-court statements.

III. Use of Leading Questions

The trial judge permitted the government to use leading questions during A.T.'s direct examination. We review that decision for an abuse of discretion. *See United States v. Rodriguez-Garcia*, 983 F.2d 1563, 1570 (10th Cir.1993). "In this realm the widest possible latitude is given to the judge on the scene." *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 12 (1st Cir.1993).

Fed.R.Evid. 611(c) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." This circuit has long recognized the necessity of using leading questions to elicit testimony from child sex abuse victims. *See Antelope v. United States*, 185 F.2d 174, 175 (10th Cir.1950). Indeed, the Advisory Committee Notes to Rule 611(c) expressly identify the examination of child witnesses as an exception to the general prohibition on the use of leading questions during direct examination. Fed.R.Evid. 611(c) advisory committee's note; *see also United States v. Castro-Romero*, 964 F.2d 942, 943-44 (9th Cir.1992) (leading question used during direct examination of 8-year-old sex abuse victim).

In this case, A.T.'s direct examination did involve a significant number of leading questions. It is evident from the record, however, that A.T. was reluctant to testify about her abuse. In fact, questioning was halted several times in order for A.T. to regain her composure and willingness to discuss the events at issue. The defense twice objected to the leading questions; both times the district judge decided to permit them. Under these circumstances, we cannot say that the district court abused its discretion in determining that leading questions were necessary to develop A.T.'s testimony.

VI. Cumulative Error and Fundamental Unfairness

Finally, Tome argues that "[t]his Court need not decide whether the individual errors discussed herein require reversal of Tome's conviction; it is clear that the cumulative effect of those errors rendered the trial in this case fundamentally unfair." We interpret this assertion to raise two distinct arguments.

First, Tome appears to make a preemptory strike at a potential harmless error analysis. In this regard, he contends that, even if the alleged trial errors were individually harmless, they were not harmless in the aggregate. This argument is unavailing, however, because we already have concluded that the trial court's individual rulings were not erroneous. "[A] cumulative-error analysis aggregates only *actual errors* to determine their cumulative effect." *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir.1990) (emphasis added); *see also United States v. Haar*, 931 F.2d 1368, 1377 (10th Cir.1991) (effect of non-errors not included in aggregation).

Second, we interpret Tome's argument to challenge the "fundamental fairness" of his trial under the Due Process Clause of the Fifth Amendment. A trial is fundamentally unfair under the Fifth Amendment's Due Process Clause if it is "shocking to the universal sense of justice." *United States v. Russell*, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643,

36 L.Ed.2d 366 (1973) (internal quotation omitted). In *Rivera*, we noted that courts may consider prejudicial circumstances that do not amount to error in the course of reviewing for fundamental unfairness, but only when actual error has also occurred. 900 F.2d at 1477. Thus, "the linchpin of the analysis seems to be that an error was committed which, when considered with other circumstances, led to a fundamentally unfair trial." Id.

Here, as in *Rivera*, Tome requests a fundamental unfairness analysis without any actual error on which to hang his proverbial hat. Tome contends that this is a case where the government's scripted evidence, introduced through leading questions, and the defense's inability to cross-examine the source of that evidence combined synergistically to deny the defendant a fair trial. However, we already have approved of the use of leading questions in this case and have determined that A.T. was available for cross-examination under both Rule 801 and the Confrontation Clause. Moreover, the record reveals that the defendant presented his own witnesses and evidence while mounting a continuing attack on the credibility of the goverment's witness, A.T. included. The fact that a number of important evidentiary issues were decided against him, and that the jury chose to believe the government's witnesses rather than his, simply does not shock any universal sense of justice. Tome's trial, though not perfect, was fair.

We AFFIRM.

SUPREME COURT OF THE UNITED STATES

No. 93-6892

MATTHEW WAYNE TOME,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

February 22, 1994

Supreme Court, U.S.
FILED
APR 29 1994
OFFICE OF THE CLERK

(5)

No. 93-6892

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MATTHEW WAYNE TOME,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether a prior consistent statement made *after* a declarant's motive to fabricate arose rebuts a charge of recent fabrication or improper influence or motive under Fed. R. Evid. 801(d)(1)(B).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 21-41) is reported at 3 F.3d 342. The opinion of the district court (J.A. 9-10, 13-14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. The petition for a writ of certiorari was filed on November 24, 1993, and was granted on February 22, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AT ISSUE

Congress enacted the Federal Rules of Evidence in 1975. Pub. L. No. 93-595, 88 Stat. 1926 (1975), 28 U.S.C. App. (1988). The complete text of Rules 104 (a), 401 to 403, 801(a)-(d)(1), 802, and 803(24) is set forth herein at App. 1-3. The Advisory Committee's Notes to the Rules are set forth in full in *Federal Rules of Evidence for the United States Courts and Magistrates* (West Publishing Co. 1994). For legislative history of the rules, *see* generally 4 J. Bailey III & O. Trelles II, *The Federal Rules of Evidence: Legislative Histories and Related Documents* (1980).

This appeal directly concerns Fed. R. Evid. 801(d)(1)(B) which states:

> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> > (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. . . .

STATEMENT OF THE CASE

A. Trial Proceedings

On August 22, 1991, the petitioner, Matthew Wayne Tome, a Navajo Indian, was charged in a one-count superseding incident with engaging in sexual acts with a female Indian child under the age of twelve years (his daughter), in violation of 18 U.S.C. §§ 1153, 2241(c), and 2245(2)(A) and (B). JA 2-3. The indictment charged that the acts occurred in Indian Country some two years earlier, on or about June and July, 1989. A jury trial was held in this case from February 24, 1992, through March 2, 1992.

The accusations giving rise to these charges arose during the course of a bitter, protracted child custody dispute between petitioner and his ex-wife, Beverly Padilla. The couple were divorced in September, 1988, by decree of the Navajo Tribal Court. The court awarded joint custody of their only child, a daughter, A.T., born June 18, 1985, to both parents with primary physical custody to petitioner. Tr. 625-26.

Between September, 1988, and May, 1989, petitioner had custody of A.T. on weekdays; Padilla had custody on the weekends. The parents alternated custody of A.T. every two weeks during the summer of 1989. A.T. was with her mother from June 16, 1989, through June 30, 1989. Tr. 396-97, 412, 626, 633.

In mid-1989, Padilla applied to the Navajo Tribal Court to modify the custody order concerning A.T. to give her primary custody. Following a hearing on August 24, 1989, the court denied Padilla's petition for a change of custody. Petitioner was ordered to maintain primary custody of A.T. during the 1989-90 school year; Padilla received custody on weekends and throughout the summer of 1990. Tr. 398, 401, 411, 431, 529-32, 633-35.

The summer of 1990 represented the longest continuous time period in which Padilla had maintained custody of A.T. since the time of the divorce. By this time,

Padilla had remarried and was residing with her new husband and their infant son in Colorado Springs, Colorado. A.T. spent the summer of 1990 in Colorado Springs with Padilla and her new family; the child was to be returned to petitioner at the end of the summer. Tr. 400-01, 434, 634.

As a result of Padilla's continued battle for custody of A.T., a court hearing was scheduled for August 22, 1990, to review custody arrangements. The tribal court ordered that petitioner retain primary custody of A.T. and that Padilla continue to receive visitation. Padilla did not attend that hearing; she testified at petitioner's trial that she mistakenly believed that the hearing was to be held two days later. Tr. 446, 449, 538.

In November, 1990, after A.T. had come forward with her allegations of sexual abuse against her father, the Navajo Tribe filed a dependency action concerning the child. Dependency actions are filed in cases involving allegations of neglect, abandonment, or abuse of a child. A hearing was held on January 24, 1991. By tribal court order of February 15, 1991, Padilla received physical custody of A.T. and petitioner was granted visitation rights. Tr. 539-43.

The government maintained that the offenses with which Tome was charged occurred on or about June 18, 1989, the date of A.T.'s fourth birthday. At trial, A.T., then almost seven years old, was the government's first witness. Although she was able to respond to preliminary inquiries, her testimony on direct examination about the alleged abuse was brief and consisted almost entirely of supplying the indicated answer to a series of leading questions by government counsel. Tr. 83-84.

The following exchange occurred on the government's direct examination of A.T.:

> Q Did daddy take your clothes off, yes or no?
> A Yes.

Q Okay. Did daddy take his clothes off?
A Yes.

Tr. 88.

* * * *

Q . . . Did he do something?
A Yes.
Q Was it good something or bad something?
A Bad.
Q It was bad. Did it hurt or did it feel good?
A Hurt.

Tr. 89.

* * * *

Q . . . Did he put his private place any place on you?
A Yes.

Tr. 90.

* * * *

Q Where did daddy place his private place, just point, point to me. Point to where you are looking right now. . .

Q What do you call this place? What is that place on you? Do you have a name for that?
A No.
Q You don't call it anything? Do you go potty there?
A Yes.
Q Okay. And Andrea, where did your daddy place his private thing, anywhere else? And point to me if he did, where. Point to my body wherever he put it. Where? Is that my mouth you are pointing at? Say yes or no.
A Yes
Q All right. Did he put his private thing in your mouth?
A Yes.

Tr. 92-93. Finally, the child was asked whether she went to the bathroom after the incident; she again responded "yes" and added that she wiped off blood. Tr. 93-94.

On cross-examination, A.T. responded to questions posed by defense counsel about extraneous matters, but failed to respond to nearly all queries concerning the allegations of sexual abuse. The trial judge, obviously troubled by the child's uncooperativeness on cross-examination, stated:

> [I]ntegrals of time have elapsed between the time that the question is finished until the next question is asked of up to as much as 45 or 50 seconds. I don't know what the reason for that is of the witness' inability to comprehend. I sense that some questions are in that category, but there are other questions that appear to be rather simple questions, and the witness nevertheless has not responded and has waited for the next question as much as, as I say, 40, 45 seconds, many times 20 seconds, 25 seconds. And I've been timing that with my watch.

Tr. 147. A.T. testified that the only person with whom she had discussed the alleged abuse was the prosecutor. Tr. 145. The child denied that she ever spoke with her babysitter about the alleged abuse; she either failed to respond or stated that she was unable to remember when asked about other out-of-court statements concerning the alleged abuse. Tr. 152-53.

The defense established on cross-examination that A.T. preferred to live with her mother rather than her father. The child was asked whether she played with friends; she responded that she did at her mother's but not at her father's. A.T. testified that she missed her mother when she was with her father, but that she did not miss her father when she lived with her mother. JA 4-5.

The trial court permitted the admission of seven of A.T.'s out-of-court statements under Fed. R. Evid. 801(d)(1)(B), concluding that defense counsel impliedly had charged A.T. with the improper motive of preferring to live with her mother. JA 9-11, 14. The trial court did not address the issue of how the prior consistent statements

served to rebut the charge of recent fabrication or improper influence or motive. Defense counsel objected that the court's ruling was overbroad. JA 10, 14.

The seven statements admitted under Rule 801(d)(1)(B) were as follows:[1]

1. A statement by the five-year-old A.T. to Lisa Rocha, friend of Padilla and babysitter of A.T., on August 22, 1990,[2] the day before A.T. was scheduled to return to her father's custody. Rocha testified that A.T. said, "Please don't let my mom take my [sic] back to my father." When Rocha asked her "why", A.T. said, "Because I don't want to go back." To Rocha's repeated "why" question, A.T. was said to have responded, "Because my father gets drunk and he thinks I'm his wife." JA 11-12.[3]

2. A statement by A.T. to Rocha on August 27, 1990.[4] Rocha questioned A.T. at Padilla's request about A.T.'s prior statement that her father thinks she's his wife. Rocha testified that A.T. told her that her father dragged her through the house by her arms, took her clothes off, forced her legs open, and laid on top of her. Rocha further testified that A.T. stated that she got a sharp pain near her stomach and that

[1] Six of the seven statements inculpated Tome in the sexual abuse of A.T.; the sole exception was the statement testified to by Dr. Spiegel.

[2] The date of A.T.'s first statement about the alleged abuse coincided with the date of the hearing in which the tribal court reviewed custody arrangements concerning A.T. See discussion at page 4, *supra*.

[3] The trial court also concluded that the child's August 22 statement to Rocha was admissible under Rule 803(24) because there were circumstantial guarantees of trustworthiness equivalent to those which render statements admissible under the Rule 803(3) hearsay exception, which deals with present mental condition.

[4] After Padilla learned that she had missed the court hearing held on August 22, 1990, she did not return A.T. to petitioner; instead she brought A.T. back to Colorado Springs. Tr. 404.

when she cried for her mother, her father told her, "[y]our mother's a bitch." Rocha stated that A.T. also related how she had wiped herself with a bloody tissue. JA 12.

3. Padilla testified that she was in another room of the apartment where A.T.'s conversation with Rocha occurred on August 27, 1990. She was permitted to testify that she overheard A.T. tell Rocha about A.T.'s father pulling her legs apart. JA 20.

4. A statement by A.T. to Kae Ecklebarger, a social worker with Child Protection Services at El Paso County Social Services, on August 29, 1990. Ecklebarger testified that prior to her interview with A.T., she was informed of the sexual abuse allegations by Padilla and Rocha. Ecklebarger stated that A.T. told her that her father "put his balls in her" and kissed her all over her body, including the vaginal area. Ecklebarger also testified that A.T. told her that her father asked her to touch his penis and that she refused. According to Ecklebarger, A.T. told her that she wiped herself and saved the bloody tissue. A.T. showed it to her grandmother who responded, "If he does it again, I'm going to haul him away." A.T.'s grandmother was said to have confronted petitioner in the child's presence; he allegedly turned to A.T. and said, "It's all your fault." A.T. was said to have replied, "No, it isn't, it's all your fault." JA 16-18.

5. A statement by A.T. to Dr. Karen Kuper, a pediatrician, to whom A.T. was referred by Ecklebarger. Dr. Kuper testified that she interviewed A.T. in Padilla's presence. A.T. was said to have told Dr. Kuper that her father touched her vginal area and put "his thing" inside her. Dr. Kuper also testified that the child told her that when that happened, it had hurt and scared her.[5] JA 15.

[5] The district court also ruled that the testimony of Dr. Kuper was admissible under Fed. R. Evid. 803(4).

6. A statement by A.T. to Dr. Laura Reich, a pediatrician, who examined A.T. on September 21, 1990, in order to treat her for a rash in the vaginal area which Dr. Reich determined to have been unrelated to sexual abuse. A.T.'s mother informed Dr. Reich, prior to her examination of A.T., that Dr. Kuper had recently seen the child for possible sexual abuse. Dr. Reich testified over objection, JA 16, that A.T. told her that her father had "put his thing in her."[6] *Id.*

7. A statement by A.T. to Dr. Jean Spiegel, a third pediatrician. Dr. Spiegel testified that A.T. told her that she was touched on her breasts, her front privates, and her bottom where her poop comes out.[7] JA 20.

Dr. Kuper testified that she conducted a vaginal examination of A.T. which revealed a thin rim of hymenal tissue. Tr. 259. On cross-examination, she stated that the amount of hymenal tissue shrinks as a girl matures and that the amount of tissue A.T. had was consistent with the normal amount for an eight to ten year old girl. Tr. 273. According to Dr. Reich, her examination of A.T. indicated that the child's vaginal opening was larger than normal for her age. Tr. 293. Dr. Spiegel testified that A.T. had a very thin rim of hymenal tissue with an opening that was large for her age. Tr. 472.

Matthew Tome took the stand in his own defense and denied sexually abusing A.T. He testified, as Padilla had, Tr. 428, that the two of them experienced continual conflict over custody and visitation arrangements concerning A.T. Petitioner stated that Padilla often complained about how he cared for A.T. Tr. 632, 642.

While petitioner had custody of A.T., she lived with him, his sister, Sheba, his brother, and his parents in Mitten Rock, New Mexico. Petitioner's sister and mother,

[6] The trial court did not specifically address the admissibility of Reich's testimony concerning the child's statements to her.

[7] The district court stated, without elaboration, that Spiegel's testimony was admissible under Rules 801 and 803(4). Tr. 466.

Sheba and Sadie Tome, both testified that they never saw any indication of sexual abuse while A.T. lived with them and that A.T. had a good relationship with them and with her father. Both women denied that A.T. ever showed them any bloody tissue. Tr. 598-605, 607, 614-17, 619-20, 622.

A number of character witnesses testified on petitioner's behalf. Ida Nakai, an assistant teacher, and Cecilia Atcitty, a teacher's aide, both from the head start preschool program which A.T. attended for two years while in petitioner's custody, testified on his behalf. Petitioner was actively involved in the school as the local parent policy president. They testified that A.T. was a happy, well-adjusted child during her attendance at their school. Tr. 547, 551, 554, 559-60, 565-66.

Marjorie Owen and Leonard Anthony, who also knew petitioner through his active involvement with the head start program, testified that petitioner was a truthful person in his dealings with them. Anthony testified that petitioner demonstrated commitment to advancing the educational goals of the community and that he was a strong leader. Janice Kavadas, petitioner's high school English teacher, and Ralph Wegner, petitioner's employer for five years, testified that he was a very honest and trustworthy person. Tr. 654-56, 659-61, 665, 671.

In closing argument, the prosecutor recounted at length the substance of A.T.'s out-of-court statements. Tr. 714-22, 724-25, 744. She did not argue that the child was not motivated to accuse her father by her desire to live with her mother. In fact, the prosecutor made no mention in either her closing or her rebuttal argument of the charged improper motive that spawned the admission of the seven prior statements.

On March 3, 1992, the jury returned a guilty verdict. On May 15, 1992, the District Court sentenced Tome to a term of 144 months' (12 years') imprisonment.

B. The Court of Appeals' Opinion

On appeal to the United States Court of Appeals for the Tenth Circuit, petitioner challenged the trial court's admission under Rule 801(d)(1)(B) of A.T.'s seven prior statements. Petitioner maintained that the statements did not serve to rebut a charge by the defense that the child's accusations were motivated by a desire to live with her mother because that motive existed at the time A.T. allegedly made the prior statements.

The Tenth Circuit upheld Tome's conviction, ruling that the seven statements were properly admitted as substantive evidence under Fed. R. Evid. 801(d)(1)(B). According to the appeals court's rationale, where a charged improper motive predates a prior statement, courts must determine whether the statement is probative under Federal Rules of Evidence 402 and 403. JA 35. The pertinent factors to be weighed are the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie. JA 34.

The court of appeals found that the charged improper motive in this case was A.T.'s desire to live with her mother. JA 36. Untroubled by the fact that the child had the same motive to remain with her mother at the time of her statements as at the time of trial, the court stated, "Although this argument [that A.T. fabricated her allegations about her father because she wished to live with her mother] does present some motive to lie, we do not believe that it is a particularly strong one." JA 36. In support of its ruling upholding admission of A.T.'s prior statements, the court cited the spontaneity of the child's initial allegation of abuse and petitioner's "failure" to present evidence that the child possessed the ability to fabricate the allegations of abuse. JA 36-37.

On February 22, 1994, this Court granted certiorari, limited to the single question presented above. 114 S.Ct. 1048, 127 L.Ed.2d 370 (1994).

SUMMARY OF ARGUMENT

Federal Rule of Evidence 801(d)(1)(B) provides that a statement consistent with the declarant's testimony is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination and the statement is "offered to rebut an express or implied charge of recent fabrication or improper influence or motive. . . ." The Tenth Circuit rejected the holdings of numerous other courts of appeals and ruled that statements made *after* the declarant's motive to fabricate arose were nevertheless admissible to rebut an allegation that her in-court statements were the product of that motive. The Tenth Circuit's decision is inconsistent with the language of Rule 801(d)(1)(B), with its common law antecedents, and with the structure of the Federal Rules of Evidence.

Rule 801(d)(1)(B) allows courts to admit only those prior statements that *rebut* a charge of recent fabrication or improper influence or motive. A prior consistent statement rebuts a charged improper motive by showing that the declarant told the same story independent of the motive. This tends to prove that the challenged testimony is not a "recent fabrication" because a similar statement was made before the motive to fabricate arose. A consistent statement made after the motive to fabricate arose, while perhaps "relevant" to the allegation of fabrication, does not meet the standard set by Rule 801(d)(1)(B), which requires that the statement "rebut" the charge that the in-court testimony is false.

Rule 801(d)(1)(B) further limits the admissibility of prior consistent statements to those that rebut a charge of "*recent* fabrication or improper influence or motive" (emphasis added). The "more natural reading" (*United States* v. *Owens*, 484 U.S. 554, 561 (1988)) of the term "recent" is that the fabrication be more recent than the prior consistent statement, which is the interpretation of Rule 801(d)(1)(B) that most courts and commentators have adopted.

The Tenth Circuit's balancing test conflicts not only with the language of Rule 801(d)(1)(B) but with the common law precedent that this Court has held to be appropriate guidance in interpreting the scope of the Federal Rules of Evidence. *United States* v. *Abel*, 469 U.S. 45, 52 (1984). The common law rule, as this Court held long ago, is that prior consistent statements are not admissible if they were made after the motive to fabricate arose. *Ellicott* v. *Pearl*, 35 U.S. (10 Pet.) 412, 439 (1836); *Conrad* v. *Griffey*, 52 U.S. (11 How.) 480, 491-92 (1850). The language of Rule 801(d)(1)(B), which repeats the terms of art in the common law, as well as the Notes of the Advisory Committee on the Federal Rules of Evidence, confirm that Rule 801(d)(1)(B) was intended to and does carry forward and codify this traditional common law understanding concerning the admissibility of prior statements. *Cf., e.g.*, Rule 801(d)(1)(B) *with Ellicott v. Pearl*, 35 U.S. (10 Pet.) at 439 ("where the testimony is assailed as a *fabrication* of *recent* date . . . in order to *repel* such imputation, proof of the antecedent declaration of the party may be admitted") (emphasis added).

The Tenth Circuit's balancing test also conflicts with the structure of the Federal Rules of Evidence. The Rules are designed, with few exceptions, to eliminate from the judge's purview the uncertain task of weighing the probative force of hearsay statements in light of various "factors" and instead to create certain clear categories or classes of admissible statements. Where balancing is to be done, such as in Rule 803(24), the Rules clearly set forth the factors for the court to consider, factors that were ignored here. *See* Fed. R. Evid. 803(24). Converting Rule 801(d)(1)(B) into a balancing test thus does violence not only to that rule but to Rule 803(24) and to the fundamental principles that underlie the federal hearsay rules.

Before admitting a prior statement to rebut a charge of recent fabrication or improper influence or motive, the

trial court should be required to find by a preponderance of the evidence that the prior statement was made prior to the time the declarant's alleged improper motive arose. In this case, the court of appeals should have held that, because the child had the same motive to remain with her mother at the time of her prior statements as she did at the time of trial, her prior statements could not and did not rebut the charged motive and were therefore inadmissible.

ARGUMENT

I. THE LANGUAGE AND COMMON LAW ANTECEDENTS OF RULE 801(d)(1)(B) REQUIRE THAT A PRIOR CONSISTENT STATEMENT PRECEDE IN TIME AN IMPROPER MOTIVE TO BE ADMISSIBLE.

In interpreting the Federal Rules of Evidence, this Court consistently follows the well-settled canon of statutory construction that the plain meaning of the language of the Rules controls. The starting point for analysis of a Federal Rule of Evidence is "the language of the Rule itself." *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 163 (1988). The Federal Rules of Evidence must be interpreted in the same manner as statutes. *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2393 (1993).

Accordingly, this Court has repeatedly refused invitations either to relax or augment the plain requirements of a Rule of Evidence. *See, e.g., United States* v. *Salerno*, 112 S.Ct. 2503, 2507 (1992) ("[n]othing in the language of Rule 804(b)(1) suggests that a court may admit former testimony absent satisfaction of each of the Rule's elements. . . . This Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases"); *Huddleston* v. *United States*, 485 U.S. 681, 687-88 (1988); *Bourjaily* v. *United States*, 483 U.S. 171, 178 (1987); *Owens*, 484 U.S. at 561.

The language of Rule 801(d)(1)(B), particularly when read in the context of both the common law antecedents of the Rule and the structure of the Federal Rules of Evidence, compels the conclusion that a prior consistent statement is admissible under this Rule only when made prior in time to the existence of the alleged motive to fabricate. The Tenth Circuit therefore erred in admitting the testimony of six witnesses concerning A.T.'s prior statements.

A. The Language Of Rule 801(d)(1)(B) Establishes That The Consistent Statement Must Be Made Prior To A More Recent Fabrication Or Improper Influence Or Motive To Be Admissible.

1. A prior consistent statement is not hearsay if, *inter alia*, the statement "is offered to *rebut*" a charge of recent fabrication or improper influence or motive. Fed. R. Evid. 801(d)(1)(B) (emphasis added). The requirement under Rule 801(d)(1)(B) that a prior consistent statement predate the charged recent fabrication or improper motive is inherent in the Rule's limited application to statements that "rebut" alleged fabrications. "Rebut" is not synonymous with "relate." A prior statement rebuts a claim of fabrication only if it refutes or negates it. *See, e.g., Black's Law Dictionary* 1139 (5th ed. 1979):

> Rebut. In pleading and evidence, to defeat, refute or take away the effect of something. When a plaintiff in an action produces evidence which raises a presumption of the defendant's liability, and the defendant adduces evidence which shows that the presumption is ill-founded, he is said to "rebut it." [8]

[8] The rebuttal requirement of Rule 801(d)(1)(B) is clearly not met by a mere claim that a prior statement is "offered to" rebut if it does not, in fact, rebut the charges specified by the Rule. Such a reading could condition a hearsay exemption on spurious representations by the offering party. Although this Court has consistently adhered to the plain meaning of the text of the Federal Rules of Evidence, it has refused to interpret the Rules in a manner that leads to an absurd result. *See Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989) (refusing to interpret Rule 609 to reach an illogical result that would favor civil defendants over plaintiffs with respect to evidence of former convictions).

Such a rebuttal can be made, in turn, only by a prior statement that antedates the motive for fabrication. As Wigmore explains: "A consistent statement, at a *time prior* to the existence of a fact said to indicate bias, interest, or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence." 4 Wigmore, *Evidence* § 1128 at 268 (Chadbourn rev. 1972) (hereinafter Wigmore) (emphasis in original). Other commentators [9] and most courts [10] are in accord.

[9] The commentators generally agree that relevancy to rebut a charge of improper motive turns on whether the statement precedes the existence of the improper motive. *See, e.g.*, 1 *McCormick on Evidence* § 47, at 177 (4th ed. J.W. Strong 1992) ("if the attacker has charged bias, interest, corrupt influence, contrivance to falsify or want of capacity to observe or remember, the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated"); M. Graham, *Federal Practice and Procedure: Evidence* § 6712 n.8 (Interim Edition 1992) ("To rebut a charge of improper influence or motive, the prior consistent statement must precede the formation of the alleged partiality").

[10] The following circuits have held that a statement qualifies as nonhearsay under Rule 801(d)(1)(B) only if made before the charged improper motive arose: *United States* v. *Vest*, 842 F.2d 1319, 1329-30 (1st Cir. 1988); *United States* v. *Brennan*, 798 F.2d 581, 587 (2d Cir. 1986); *United States* v. *Casoni*, 950 F.2d 893, 904 (3rd Cir. 1991) (statement not relevant under relevancy rules if motive to fabricate existed when statement made); *United States* v. *Henderson*, 717 F.2d 135, 138 (4th Cir.), *cert. denied*, 465 U.S. 1009 (1984); *United States* v. *Lewis*, 954 F.2d 1386, 1391 (7th Cir. 1992); *United States* v. *White*, 11 F.3d 1446, 1450 (8th Cir. 1993). The following circuits have held that a prior statement can be used to rebut a charge of improper motive even if the statement does not predate the alleged motive: *United States* v. *Montague*, 958 F.2d

Conversely, if the prior statement was subject to the same improper motive as the trial testimony, it cannot rebut the impeachment. *See* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 801(d)(1)(B)[01] at 801-188 to 801-189 (1993) (hereinafter Weinstein) ("Substantive use under Rule 801(d)(1)(B) is limited to situations where high probative value is most likely. . . . Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force 'for the simple reason that repetition does not imply veracity' ") (citation omitted)).[11] "The fact that the witness said the same thing, at a time when the same alleged motive was operative, provides no counterweight to the charge that she is saying it now because of that motive." *United States* v. *Montague*, 958 F.2d 1094, 1100 (D.C. Cir. 1992) (Judge Wald, concurring in the result and dissenting in part as to the rationale).

In a case factually similar to the instant case, *United States* v. *White*, 11 F.3d 1446 (8th Cir. 1993), the court determined that a statement by an alleged child sexual abuse victim did not qualify as nonhearsay under Rule 801(d)(1)(B) because the charged improper motive, if it existed at all, existed at the time of the statement.

1094, 1098 (D.C. Cir. 1992); *United States* v. *Parry*, 649 F.2d 292, 296 (5th Cir. Unit B 1981); and *United States* v. *Anderson*, 782 F.2d 908, 915-16 (11th Cir. 1986). *See also United States* v. *Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989) (holding that the pre-motive requirement under Rule 801(d)(1)(B) should not be applied as a "rigid *per se* rule"); *United States* v. *Lawson*, 872 F.2d 179, 183 (6th Cir. 1989) (declaring that the fact that the alleged improper motive antedates the statement does not preclude its admissibility where other indicia of reliability surround the statement).

[11] *See also* 1 *McCormick on Evidence* § 47, at 174 (4th ed. J.W. Strong 1992) (the admissibility of a prior consistent statement turns on whether the prior statement is "logically relevant to rebut the impeaching fact. . . . The wall, attacked at one point, may not be fortified at another and distinct point").

> We have held, adhering to the rule in the majority of the circuits, that 'prior consistent statements must be entirely independent of the alleged motive to fabricate before they can be admitted for substantive purposes.' . . . We cannot say that this is the case here. Had R.H. made up the entire story prior to the filing of the complaint with the Department of Social Services, the statements he made to Martinez would have been part of the fabrication and therefore, of no probative value to a determination of whether the story was in fact a fabrication.

Id. at 1450-51 (citation omitted).

In sum, the explicit criterion in Rule 801(d)(1)(B) that the prior consistent statement "rebut" the charge of improper motive requires that the consistent statement be made prior to the time that the motive came into being.

2. There is a second anchor in the text of Rule 801(d)(1)(B) for the traditional understanding that prior consistent statements must predate the motive to fabricate. Rule 801(d)(1)(B) states that a witness's prior consistent statement is admissible if it "is offered to rebut an express or implied charge against the declarant of *recent* fabrication or improper influence or motive" (emphasis added). The word "recent" introduces a temporal criterion into the Rule's operation. Any valid interpretation of the rule must account for this temporal element. Any such interpretation must answer the question: "Recent with respect to what?".[12]

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[12] As a preliminary matter, it should be noted that the most natural reading of Rule 801(d)(1)(B) is to apply the adjective "recent" to all three of the nouns that follow it, so that the Rule applies to charges of recent fabrication, recent improper motive, or recent improper influence. No comma follows the word fabrication to indicate that the word recent was not intended to modify the three nouns following it. Moreover, applying the word recent to all three is consistent with the fact that most courts, both under the common law and subsequent to adoption of Rule 801(d)(1)(B), have treated the terms "fabrication," "improper motive" and "improper influence" as interchangeable and synonymous with the

The Rule does not specifically answer this question. But the overwhelming consensus of courts and commentators is that the alleged recent fabrication, improper motive or improper influence must be more "recent" than the prior consistent statement. *See* 1 *McCormick on Evidence* § 47, at 179 n.24 (4th ed. J.W. Strong 1992) (hereinafter McCormick), citing *People* v. *Singer*, 89 N.E.2d 710 (N.Y. 1949) (the fabrication must be "more recent than the consistent statement"); E. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and A New Proposal*, 1987 B.Y.U.L.R. 231, 246 (hereinafter Ohlbaum) (the term "recent" "purposefully introduces the crucial element of time frame during which the alleged motive to lie emerged. If improper influence or motive is the basis for the intentionally fabricated testimony, 'recent' fabrication requires that the motive occur after the consistent statement was made"); *see also* cases cited in Part I.B., *infra*.

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concept of intentional falsification arising from improper motive. For the common law, see E. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and A New Proposal*, 1987 B.Y.U.L.R. 231, 239 (observing that "an examination of common law decisions reveals that even where the court labeled the charge 'recent fabrication,' the prior consistent statement was still required to have been made at a time before the [underlying] motive to fabricate existed"); *Malone* v. *United States*, 94 F.2d 281, 287 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938) ("[T]he general rule [is that] where the testimony of the witness is assailed as a fabrication of a recent date, proof that he gave a similar account of the transaction when no motive existed, is admissible"); *Affronti* v. *United States*, 145 F.2d 3, 7 (8th Cir. 1944) (similar); *Ryan* v. *United Parcel Service, Inc.*, 205 F.2d 362, 364 (2d Cir. 1953) (similar). For post-1975 cases, see *United States* v. *Pierre*, 781 F.2d 329, 330 (2d Cir. 1986) (prior consistent statement is nonhearsay under Rule 801(d)(1)(B) "where the consistent statement was made prior to events creating a motive to testify falsely at trial"); *United States* v. *Andrews*, 765 F.2d 1491, 1501 (11th Cir.), *cert. denied*, 474 U.S. 1064 (1986); *United States* v. *Feldman*, 711 F.2d 758, 766 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983); *United States* v. *Allen*, 579 F.2d 531, 532 (9th Cir.), *cert. denied*, 439 U.S. 933 (1978).

The other potential referent for the term "recent" is the time of trial. In this interpretation, prior consistent statements would be admissible under Rule 801(d)(1)(B) only in those instances where an improper motive is alleged to have arisen near to the time of trial. There is no principled basis, under such a reading, to draw a line between those fabrications close enough to trial to trigger application of the Rule, and those too remote in time. Accordingly, the "more natural reading" (*United States* v. *Owens*, 484 U.S. at 561) of the term "recent" in Rule 801(d)(1)(B) is that the fabrication or improper motive must be more recent than the prior consistent statement. *See, e.g.*, McCormick, *supra*, § 47, at 179 n.24, discussing *Singer*, and citing additional authorities.

B. The Common Law Antecedents Of Rule 801(d)(1)(B) Require That A Prior Consistent Statement Admitted To Rebut A Charge Of Improper Motive Predate That Motive.

1. The common law antecedents of Rule (801)(d)(1)(B) confirm the correctness of the majority view of the Rule's meaning. As this Court has held, it is appropriate to look to the common law antecedents of the Rules of Federal Evidence in interpreting the Rules. *United States* v. *Abel*, 469 U.S. at 52 (quoting with approval the statement of E. Clearly (the Reporter for the Advisory Committee which drafted the Federal Rules of Evidence), *Preliminary Notes on Reading the Rules of Evidence*, 57 Neb. L. Rev. 908, 915 (1978), that "the body of common law knowledge continues to exist [for purposes of interpreting the Rules], though in the somewhat altered form of a source of guidance in the exercise of delegated power."); *id.* at 51 (looking to pre-1975 case law for guidance in interpreting the Federal Rules of Evidence). The rules are presumed to carry forward the common law understanding. "A party contending that legislative action changed settled law has

the burden of showing that the legislature intended such a change." *Green* v. *Bock Laundry*, 490 U.S. 504, 521 (1989).

The common law is particularly relevant here because Rule 801(d)(1)(B) codifies the traditional common law components required for the admission of prior consistent statements and uses the precise terms employed in countless numbers of pre-1975 cases. Moreover, the notes of the Advisory Committee expressly state its intent to codify the traditional rule for admitting such statements.

Rule 801(d)(1)(B) "codifies the traditional components required by common law for the admission of this 'carefully confined' class of statements." Ohlbaum at 242 (quoting *United States* v. *Check*, 582 F.2d 668, 680 (2d Cir. 1978)). Those components are that the declarant testifies at trial and is subject to cross examination concerning the statement, the statement is consistent with declarant's testimony, a predicate showing of an express or implied charge of recent fabrication or improper motive or influence exists, and the statement rebuts the charge. *See United States* v. *Quinto*, 582 F.2d 224, 233-34 (2d Cir. 1978) (listing components and holding that "the standards for determining whether prior consistent statements can now be admitted as substantive evidence [under the Rule] are precisely the same as the traditional standards"); Ohlbaum at 243.

In addition to codifying the traditional common law components, Rule 801(d)(1)(B) uses the exact terms most frequently employed in the common law. *See, e.g., Ellicott v. Pearl*, 35 U.S. (10 Pet.) at 439 ("where the testimony is assailed as a *fabrication* of *recent* date . . . in order to *repel* such imputation, proof of the antecedent declaration of the party may be admitted") (emphasis added); *United States* v. *Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972) ("prior consistent statements can only be introduced after a *charge* [of] . . . *recent fabrication* and where the statements were made before any *motive to fabricate* developed") (emphasis added);

Singer, 89 N.E.2d at 712 ("[a]ll this accords with the view anciently expressed . . . that the idea of *fabrication* may be *rebutted* 'by circumstances showing that the *motive* upon which it is supposed to have been founded, could not have had existence at the time when the previous relation was made, and which therefore *repel* the supposition of the fact related being an afterthought or *fabrication*'") (quoting II Evans' *Pothier on Contracts* at 251-52 (1826)) (emphasis added); Ohlbaum at 245 (the Rule "employs the precise language—'rebut[ting] . . . charge[s] . . . of recent fabrication or improper influence or motive'—consistently used in the panoply of pre-1975 decisions").

The Notes of the Advisory Committee on Rule 801(d)(1)(B) also indicate that the Rule was intended to codify the traditional common law requirements for the admission of prior consistent statements for rehabilitative purposes. The complete Advisory Committee notes expressly pertaining to Rule 801(d)(1)(B) provide:

> Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

Advisory Committee Note, 28 U.S.C. App., at 773. As the notes indicate, the Committee did not alter the traditional standards for admission of prior consistent statements to rebut charges of recent fabrication or improper influence or motive; the rule merely made one change: permitting substantive admission of statements previously admitted solely for a rehabilitative purpose. *See* 4 D. Louisell & C. Mueller, *Federal Evidence* § 420, at 194-95 (1980); M. Graham, *Federal Practice and Procedure: Evidence* § 6712 n.4 (Interim Edition 1992). Indeed, the

Advisory Committee made plain its overall intention with the hearsay rules to preserve the common law: "The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions. . . ." 28 U.S.C. App., at 771. Given the absence of Congressional comment or revision concerning Rule 801(d)(1)(B),[13] "the [Advisory] Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted." *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. at 165 n.9.

2. This Court recognized long ago that, under the common law, prior consistent statements are not admissible to rebut a charge of fabrication except where made prior to the charged motive to fabricate. The Court held in *Ellicott* v. *Pearl*, 35 U.S. (10 Pet.) at 439, that certain prior consistent statements made "subsequently" to prior inconsistent statements introduced to impeach the witness were rightly excluded, and stated:

> testimony under oath is better evidence than [the witness's] confirmatory declarations, not under oath; and the repetition of his assertion does not carry his credibility further, if so far, as his oath. . . . [T]here are exceptions; but they are of a peculiar nature, not applicable to the circumstances of the present case; as, where the testimony is assailed as a fabrication of a recent date, or a complaint recently made; for there,

[13] Congress did not question the Advisory Committee's indication that Rule 801(d)(1)(B) would permit substantive admission of statements traditionally admitted for rehabilitative purposes. The enactment of Fed. R. Evid. 801(d)(1)(B) generated virtually no controversy. Unlike the contested provisions of Rule 801(d)(1) subsections A and C, the terms of Rule 801(d)(1)(B) were uniform in substance in the March 1969 draft of the Rules, the 1971 draft, the form prescribed to Congress by this Court, and the Rule in its present form. *See* 11 J. Moore & H. Bendix, *Moore's Federal Practice* § 801.01, pp. VIII-15 to VIII-17 (2d ed. 1994).

> in order to repel such imputation, proof of the antecedent declaration of the party may be admitted.

Fourteen years later, in *Conrad* v. *Griffey*, 52 U.S. (11 How.) 480, the Court held inadmissible a prior statement that did not precede an inconsistent statement with which a witness had been impeached. The Court stated, "So far as regards principle, one proper test of the admissibility of such statements is, that they must be made at least under circumstances when no moral influence existed to color or misrepresent them." *Id.* at 491 (citations omitted). The Court went on in *Conrad* to explain that prior statements "are admissible only to sustain the credit of the witness impugned, and not as per se proof of the facts stated." *Id.* at 492. *See also* Wigmore, *supra*, § 1123-1124, at 254-58.

Consistent with *Ellicott* and *Conrad*, the common law approach was that a prior statement was hearsay and could be admitted only in response to impeachment and only for rehabilitative purposes. *See* McCormick, *supra*, § 47, at 177 ("the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made *before* the sourse of the bias, interest, influence or incapacity originated. The above results should ordinarily be reached under the Federal Rules of Evidence") (emphasis in original; footnotes omitted); Wigmore, *supra*, § 1128, at 268);[14] Weinstein at 801-185 to 801-187; Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 Hastings

[14] The Government appears to concede that this was the established common law rule at the time of enactment of Rule 801(d)(1)(B). *See* Brief for the United States in Opposition [to Certiorari] at 13 (stating: "As the Second Circuit explained in *United States* v. *Quinto*, under the law of evidence before the adoption of the Federal Rules of Evidence, a prior statement must have been made before the motive to fabricate arose, because 'only then was the prior consistent statement "relevant" on the issue of credibility.' 582 F.2d at 233").

L.J. 575, 581 (1979); *United States* v. *Quinto*, 582 F.2d at 232-33 (holding that the traditional common law pre-motive requirement was "not altered" by Federal Rules of Evidence).[15] Courts traditionally were wary of the admission of prior statements, recognizing their inherent untrustworthiness and the danger that a designing witness might manufacture statements in order to create evidence. *See, e.g., United States* v. *Leggett*, 312 F.2d 566, 572 (4th Cir. 1962) ("[A] person might concoct an entirely false account of some happening and, after relating this account to a dozen of his neighbors, might call them in corroboration when at a later time he told the same untruthful story on the witness stand"); *Dowdy* v. *United States*, 46 F.2d 417, 424 (4th Cir. 1931).

In light of the common law view that prior consistent statements were highly suspect, were generally inferior to statements given under oath, and should be admitted only

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[15] *See also DiCarlo* v. *United States*, 6 F.2d 364, 366 (2d Cir. 1925); *United States* v. *Potash*, 118 F.2d 54, 57 (2d Cir.), *cert. denied*, 313 U.S. 584 (1941); *United States* v. *Corry*, 183 F.2d 155, 157 (2d Cir. 1950); *Felice* v. *Long Island R.R.*, 426 F.2d 192, 198 (2d Cir.), *cert. denied*, 400 U.S. 820 (1970); *Zito*, 467 F.2d at 1404 ("prior consistent statements can only be introduced after a charge [of] . . . recent fabrication and where the statements were made before any motive to fabricate developed"); *Dowdy* v. *United States*, 46 F.2d 417, 424 (4th Cir. 1931); *Malone* v. *United States*, 94 F.2d 281, 287 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938) ("the general rule [is that] where the testimony of the witness is assailed as a fabrication of a recent date, proof that he gave a similar account of the transaction when no motive existed, is admissible"); *Lindsey* v. *United States*, 237 F.2d 893, 895 (9th Cir. 1956) (recognizing pre-motive rule as "the majority view" and holding: "There is scant basis in reason or experience to admit [prior consistent statements], except in cases where it affirmatively appears that the prior consistent statement was made at a time when the declarant had no motive to fabricate"); *United States* v. *Rodriguez*, 452 F.2d 1146, 1148 (9th Cir. 1972). *But see United States* v. *Gandy*, 469 F.2d 1134, 1134-35 (5th Cir.), *cert. denied*, 410 U.S. 984 (1973) (per curiam) (prior consistent statement admissible although declarant had motive to fabricate at time of statement).

for purposes of rehabilitation, courts developed precise answers to the problem of when such statements should be admitted to rehabilitate. "The general test for solution is whether evidence of . . . consistent statements is *logically relevant* to explain the impeaching fact. The rehabilitating facts must meet a particular method of impeachment with *relative directness*." McCormick, *supra*, § 47, at 174 (emphasis added).

In sum, the intent of the Advisory Committee in recommending and Congress in enacting Rule 801(d)(1)(B) was that the Rule codify the traditional common law rule for the admission of prior consistent statements offered to rebut a charge of improper motive. The traditional rule was that such statements must have been made prior to the time the charged motive arose.[16] Given that the one change that the Advisory Committee did adopt was that statements admited under Rule 801(d)(1)(B) would be admitted for substantive, rather than as under the common law, merely rehabilitative, purposes,[17] "[i]t is of greatest importance" that such statements only be admitted, as intended by the drafters, under standards "precisely the same as the traditional standards. . . ." *United States* v. *Quinto*, 582 F.2d at 233.

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[16] Professor Clearly summarized the intended application of Rule 801(d)(1)(B). "While prior consistent statements are hearsay by the traditional view and inadmissible as substantive evidence, they have nevertheless been allowed a limited admissibility for the purpose of supporting the credibility of a witness, particularly to show that a witness whose testimony has allegedly been influenced told the same story before the influence was brought to bear." E. Cleary, *McCormick on Evidence* § 251, at 747 (3d ed. 1984).

[17] The justification for permitting substantive use of prior statements in Rule 801(d)(1)(B) was twofold: first, the opponent opened the door to admission of prior statements by attacking the witness's credibility; second, as a practical matter, juries are unlikely to understand and apply a limiting instruction anyway, so there is no good reason to give one. Weinstein, *supra*, at 801-188; 2 *McCormick on Evidence* § 251, at 747 (4th ed. J.W. Strong 1992).

C. The Tenth Circuit's Balancing Test Is Inconsistent With The Language And Common Law Antecedents Of Rule 801(d)(1)(B), And With The Structure Of Rules 401-403, 801-804.

Instead of employing the traditional bright-line rule for determining the admissibility of a prior consistent statement—*i.e.*, whether the statement rebuts the charge of improper motive by having been made prior to the existence of the motive—the Tenth Circuit has proposed a balancing test. The judge must weigh "the strength of the motive to lie, the circumstances in which the statement was made, and the declarant's demonstrated propensity to lie." J.A. 34. In this manner, the Judge reaches a conclusion as to whether the statement has "significant" "probative force bearing on credibility apart from mere repetition." J.A. 34, quoting *United States* v. *Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989).

1. The Tenth Circuit's balancing test is inconsistent with the specific language and the common law antecedents of Rule 801(d)(1)(B). As discussed in Part I.A., *supra*, Rule 801(d)(1)(B) specifically applies only to prior consistent statements offered to "rebut" a charge of recent fabrication or improper motive. The commonly understood meaning of "rebut" is "to defeat" or "refute." *Black's Law Dictionary* 1139 (5th ed. 1979); *see Webster's II New Riverside University Dictionary* at 981 (1984). The Tenth Circuit's balancing test is inconsistent with Rule 801(d)(1)(B)'s limitation that admissible statements rebut the charge of improper motive. Rather than refuting, defeating, or repelling the charge of improper motive, statements admissible under the Tenth Circuit's test have merely been found to have some quantum of relevance or probative force bearing on issues concerning a witness's credibility. The Tenth Circuit's balancing test is much more lax than the standard inherent in the language of the Rule, and also does not account for the temporal criterion inhering in the Rule's use of

the terms "recent fabrication or improper influence or motive."

When viewed against the background of the common law antecedents of Rule 801(d)(1)(B), the error of applying the Tenth Circuit's balancing test is even more apparent. As shown in Part I.B., *supra*, the traditional common law solution to determining what prior consistent statements may be admitted to rehabilitate a witness is to require that a statement be "logically relevant to explain the impeaching fact." McCormick, *supra*, § 47, at 174. "The rehabilitating facts must meet a particular method of impeachment with directness." *Id.* With respect to charges of improper motive, the prior consistent statements must rebut the charge by having been made prior to the existence of the motive. The Tenth Circuit's balancing test is contrary to the natural reading of the language of Rule 801(d)(1)(B), to the traditional common law rule, and to the drafter's intent that Rule 801(d)(1)(B) embody the traditional common law rule. The Tenth Circuit is not permitted to make policy by rejecting the established, bright-line common law rule that the drafters incorporated in Rule 801(d)(1)(B). *United States* v. *Salerno*, 112 S.Ct. at 2507.

2. The Tenth Circuit's balancing test also is inconsistent with the structure of the Federal Rules of Evidence. First, the Tenth Circuit has selectively incorporated into its balancing test certain factors that the framers of the Federal Rules reserved for consideration under a different rule. The Rules provide for the weighing of indicia of trustworthiness surrounding the hearsay statement of a declarant "available as a witness" in Fed. R. Evid. 803(24). That rule provides in relevant part that "[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . ." will not be excluded by the hearsay rule. Under Rule 803(24), a judge is required to weigh circumstantial factors, such as a declarant's ability to fabricate statements and the sponta-

neity of a declarant's statement, just as in the Tenth Circuit's test. Rule 803(24), however, requires that these "circumstantial guarantees of trustworthiness" be the "equivalent" of the guarantees of trustworthiness provided by other hearsay exceptions and also that the court determine that

> (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence.

The Tenth Circuit's test, which would admit out-of-court statements simply upon a finding that they had some quantum of probative force bearing on credibility, rather than upon a finding that "equivalent guarantees of trustworthiness" were present and that the other requirements of Rule 803(24) were met, is inconsistent with, and undercuts, Rule 803(24).

3. The Tenth Circuit's balancing test is also contrary to the structure of Fed. R. Evid. 401-403 and 801-804, and the Advisory Committee's intent that hearsay admissibility determinations under Rules 801-804 generally not turn on balancing tests such as those in Rules 402-403 involving the weighing of "probative force."

In drafting Article VIII, the Advisory Committee specifically considered and rejected the use of a balancing test based on "probative force" to determine the admissibility of hearsay, and specifically endorsed maintaining a system of well-defined class or category exceptions to the general ban on hearsay:

> Abandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards, has been impressively advocated. Weinstein, The Probative Force of Hearsay, 46 Iowa L. Rev. 331 (1961). Admissibility would be determined by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence. The bases of the traditional hearsay exceptions would be helpful in assessing probative force. Ladd, The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof, 18 Minn.L.Rev. 506 (1934). Procedural safeguards would consist of notice of intention to use hearsay, free comment by the judge on the weight of the evidence, and a greater measure of authority in both trial and appellate judges to deal with evidence on the basis of weight. *The Advisory Committee has rejected this approach to hearsay* as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases.

Advisory Committee Notes to Article VIII, Introductory Note: The Hearsay Problem, 28 U.S.C. App., at 771 (emphasis added). The Advisory Committee thus considered, and rejected, as a general approach to admitting hearsay, the very balancing test proposed by the Tenth Circuit, *i.e.*, a balancing test "weighing the probative force of the evidence against the possibility of prejudice." *Id.* The Advisory Committee rejected this approach to hearsay as "involving too great a measure of judicial discretion," "minimizing the predictability of rulings," "enhancing the difficulties of preparation for trial," further complicating the "over-complicated congeries of pretrial procedures," and requiring different rules for civil and criminal cases.

In addition, the Advisory Committee expressed doubt that a judge could employ "probative force" in a balancing test without becoming the fact-finder and impermis-

sibly excluding evidence simply because he or she did not believe it:

> The only way in which the probative force of hearsay differs from the probative force of other testimony is in the absence of oath, demeanor, and cross examination as aids in determining credibility. For a judge to exclude evidence because he does not believe it has been described as "altogether atypical, extraordinary. . . ." Chadbourn, Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv. L. Rev. 932, 947 (1962).

Id.

The Tenth Circuit's interpretation of Rule 801(d)(1)(B) thus runs counter to the structure of Rules 401-403 and 801-804. By retaining a "system of class exceptions" that define categories of admissible hearsay by using criteria that do not require weighing "probative force", the Advisory Committee sought to avoid employing analysis of probative force in determining admission. Each of the other exceptions in Rule 801(d)(1), for example, applies to narrowly defined categories of prior statements.[18] The language and common law antecedents of Rule 801(d)(1)(B) suggest that it, too, should be limited to a well-defined "class" not based on assessments of probative force, *i.e.*, to statements that logically rebut or disprove a charge of improper motive by arising prior to that motive.

---

[18] *See* Rule 801(d)(1)(A) (prior statement inconsistent with declarant's testimony); Rule 801(d)(1)(C) ("statement . . . of identification of the person made after perceiving the person").

II. DISTRICT COURTS ARE REQUIRED TO MAKE FINDINGS DEMONSTRATING BY A PREPONDERANCE OF THE EVIDENCE THAT A PRIOR CONSISTENT STATEMENT SERVES TO REBUT A CHARGED MOTIVE TO FABRICATE.

Fed. R. Evid. 104(a) provides, "Preliminary questions concerning the . . . admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)." This Court held in *Bourjaily* that the offering party must establish, by a preponderance of the evidence, the preliminary facts relevant to the admissibility of a statement under the co-conspirator exception to the hearsay rule. 483 U.S. at 175-76. The same standard should apply when there is a dispute regarding preliminary facts relevant to the admissibility of a prior consistent statement under Rule 801(d)(1)(B).

When a party seeks the admission, over objection, of a prior statement to rebut a charge of improper motive, that party should be required to show when the alleged improper motive arose. Because a prior statement rebuts only if it antedates the existence of the charged improper motive, as argued in Part I, *supra*, a prior statement would not qualify as nonhearsay in the absence of a showing by a preponderance of the evidence that the statement preceded the motive.

Application of Rule 801(d)(1)(B) requires that district courts resolve disputed preliminary facts such as the timing of the improper motive. Prior to the admission of a prior statement to rebut a charge of improper motive, a district judge should make findings on the record explaining the basis of the conclusion that a prior statement does in fact rebut a charge of improper motive and thereby qualifies as nonhearsay under Rule 801(d)(1)(B).

III. THE COURT OF APPEALS FAILED TO RECOGNIZE THAT A STATEMENT SUBJECT TO A WEAK MOTIVE TO FABRICATE DOES NOT REBUT A CHARGE THAT TESTIMONY WAS AFFECTED BY THE IDENTICAL WEAK MOTIVE.

The court of appeals erred in considering the strength of the charged improper motive in this case without recognizing that weak or strong, A.T. had the same motive to live with her mother at the time of her statements as at the time of trial.[19] The statements therefore had no relevance to rebut the charge of improper motive. The strength of the improper motive at trial is unrelated to the usefulness of a prior statement to rebut the existence of that motive.

The court of appeals was persuaded in this case that the statements were properly admitted because the charged improper motive is "not a particularly strong one". JA 37. On the other hand, the court stated, "prior consistent statements made after a strong motive to lie has arisen may evidence only that the declarant is a consistent liar." JA 34. Nothing in Rule 801(d)(1)(B) lends support to the conclusion that prior statements should be admitted to rebut a weak improper motive but not a strong improper motive.

In this case, the appeals court upheld the substantive admission of seven statements by six witnesses to rebut a motive that the court found implausible.[20] The court's

[19] The government does not maintain and neither the court of appeals nor the district court has found that A.T.'s motive to remain with her mother was different at the time of her prior statements than at the time of trial.

[20] As the court of appeals recognized, it is clear on the record that A.T.'s seven prior statements were used substantively. JA 33, n.6. In closing argument, the government recounted at length the substance of A.T.'s out-of-court statements. Tr. 714-22, 724-25, 744. *See* page 11, *supra*. The court of appeals correctly noted, JA 33, n.6, that this case does not present the issue, on which the circuits are also divided, concerning the proper treatment under Rule 801(d)(1)(B) of statements used solely for rehabilitative purposes.

analysis turns logic on its head: prior statements are admitted in cases in which the charge of improper motive is not credible and hence rebuttal is not needed. Conversely, the court's rationale would render prior statements inadmissible in cases in which the charge of improper motive is highly credible. There is simply no justification for admitting prior statements to rebut a claim that is not credible.

The court of appeals' decision in this case effectively converts rule 801(d)(1)(B) into an open-ended hearsay exemption. According to the court's analysis, a prior consistent statement is exempt from the hearsay rule whenever there is a suggestion on cross-examination that a witness is not telling the truth; the statement is then admissible if relevant under the relevancy rules. Such a construction ignores the clear rebuttal mandate of Rule 801(d)(1)(B) and flies in the face of both the plain language and the legislative history of the Rule, discussed in Part I, *supra*. Indeed, it is so broad an opening as to be a complete contradiction of the language and spirit of the rule.

Creation of an open-ended hearsay exemption through Rule 801(d)(1)(B) paves the way for flagrant abuse of prior consistent statements. The court of appeals' interpretation of Rule 801(d)(1)(B) encourages parties in both civil and criminal cases to manufacture statements in order to buttress the declarant's story at trial. If the Rule 801(d)(1)(B) rebuttal requirement is treated merely as a relevance test under Rules 401-403, the government will be permitted to put on a parade of witnesses to recite out-of-court accusations and the defense will be permitted to put on a parade of witnesses to recite claims of innocence following any implication on cross-examination that a declarant is not telling the truth. The search for truth will be swiftly waylaid by stampedes of witnesses

repeating allegations of which they lack firsthand knowledge.

An open-ended approach to the admission of prior consistent statements creates incentives for litigants to hand-pick credible witnesses—such as the three doctors and the social worker used here—to hear a declarant's out-of-court statement so that they may convincingly relate the declarant's story to the jury at trial. After six witnesses recount their versions of declarant's out-of-court statements, the jury can easily overlook the fact that the declarant's own testimony was very weak. *See United States* v. *Mazza*, 792 F.2d 1210, 1215 (1st Cir.), *cert. denied*, 479 U.S. 1086 (1987) ("the government effectively managed to have the jury hear a second-hand account of [the accusatory witness'] entire story through witnesses whose credibility the jury was less apt to question"). The Tenth Circuit's analysis would permit a defendant, after a full confession to authorities, to bring in a host of elder statesmen and spiritual leaders at trial to repeat claims of innocence related to them subsequent to the confession. This risk is particularly severe under the Federal Rules, where the prior consistent statements are admissible not merely to rehabilitate but as substantive evidence.

The prosecution's case against petitioner rested almost entirely on out-of-court statements. The testimony of A.T., the only witness with firsthand knowledge of the truth of the accusations against petitioner, was exceedingly weak. Her testimony with respect to the allegations of abuse consisted of little more than assent to leading questions. After a vague hint on cross-examination that the child had an improper motive to accuse her father, the prosecution was allowed to bring in six witnesses who greatly expanded upon the child's testimony. These witnesses endowed A.T.'s story with reliability derived from their credibility. Four of the witnesses were highly credentialed professionals; five of them directly implicated petitioner in the acts of abuse. *None* of the six witnesses knew whether the allegations they recounted were true. The result, from the jury's perspective, is a parade of competent professionals seemingly vouching for the declarant's credibility.

In sum, the plain meaning and the legislative history of Fed. R. Evid. 801(d)(1)(B) demonstrate that a prior statement is defined as nonhearsay only if it rebuts a charge of recent fabrication or improper influence or motive. As this Court stated in *Salerno*, "Congress thus presumably made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, we must enforce the words that it enacted. . . ." 112 S.Ct. at 2507. In this case, because the declarant had the same motive at the time of her statements as at the time of trial, her statements did not serve to rebut the charge of improper motive or "recent" fabrication and thus did not fall within the Rule 801(d)(1)(B) definition of nonhearsay. The verdict in this case was obtained through reliance on inadmissible hearsay.

CONCLUSION

The judgment of the court of appeals must be reversed and the case remanded with instructions to grant a new trial.

Respectfully submitted,

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APPENDIX

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APPENDIX TO BRIEF OF PETITIONER

STATUTORY AND CONSTITUTIONAL PROVISIONS FEDERAL RULES OF EVIDENCE

Rule 104 provides, in relevant part:

Rule 104(a). Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 801 provides, in relevant part:

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person;

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803(24) provides, in relevant part:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(6)

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No. 93-6892

In the Supreme Court of the United States

OCTOBER TERM, 1993

MATTHEW WAYNE TOME, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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56 pp

QUESTION PRESENTED

Whether out-of-court statements made by a child sexual abuse victim who testified at trial were properly admitted under Federal Rule of Evidence 801(d)(1)(B).

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OPINION BELOW

The opinion of the court of appeals (J.A. 21-41) is reported at 3 F.3d 342.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. The petition for a writ of certiorari was filed on November 24, 1993, and was granted on February 22, 1994, limited to the first question presented in the petition. J.A. 42. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 801(d) of the Federal Rules of Evidence provides in pertinent part as follows:

A statement is not hearsay if—

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of aggravated sexual abuse of a child, in violation of 18 U.S.C. 1153, 2241(c), and 2245(2)(A) and (B). He was sentenced to 144 months' imprisonment. The court of appeals affirmed. J.A. 21-41.

A. A.T.'s Out-Of-Court Statements

The evidence at trial showed that, in June 1989, petitioner, a Navajo Indian, sexually assaulted his then four-year-old daughter, A.T., by placing his penis in her genitals and mouth, by placing his fingers in her genitals, and by having contact between his mouth and her vulva. The assault took place on an Indian reservation while petitioner had custody of the child.

Petitioner and his wife, Beverly Padilla, were divorced in September 1988. The parents were originally awarded joint custody of A.T., with petitioner having primary physical custody, and Padilla having visitation rights and custody on weekends and holidays. Petitioner and Padilla had continuing disputes over custody, and beginning in June 1989, petitioner and Padilla alternated two-week periods of custody of

A.T. J.A. 21-22; VI-A Tr. 395, 398, 409-420, 464, 528-530.

The assault occurred during June 1989, while A.T. was staying with petitioner in Mitton Rock, New Mexico. Petitioner undressed A.T. and himself. A.T. tried to cross her legs, but petitioner forced them apart. Petitioner then climbed on top of A.T. and penetrated her vagina with his penis. He also put his penis in A.T.'s mouth. After petitioner finished, A.T. went to the bathroom and wiped blood from her vaginal area. J.A. 22-23; IV Tr. 83-84, 88-90, 93-94.

A.T. did not tell her mother of the attack until more than a year later, when A.T. was living with her mother and her mother's new husband in Colorado under a modified custody order. A custody review hearing was scheduled for August 24, 1990, in Shiprock, New Mexico. On August 22, the day before the family was going to drive to Shiprock, A.T. said to her baby-sitter, Lisa Rocha, "Please don't let my mom take m[e] back to my father." J.A. 11. When Rocha asked why, A.T. responded, "Because my father gets drunk and he thinks I'm his wife." J.A. 12. Because Rocha was preoccupied with her own child at the time, she did not immediately appreciate the significance of A.T.'s words. After a few minutes, Rocha asked A.T. what she meant, but A.T. would not talk to her. J.A. 24; V Tr. 219.

Padilla and A.T. missed the custody hearing because it had been rescheduled. On August 26, Rocha telephoned Padilla, told her what A.T. had said, and asked her to find out what A.T had meant. Rocha telephoned Padilla again the next morning and urged her to speak to A.T. A.T. refused to speak to Padilla, however, so Padilla asked Rocha to come to Padilla's

house and talk to A.T. V Tr. 220-222; VI-A Tr. 406-407.

When Rocha arrived, Padilla went into another room, turned her back to A.T. and Rocha, and listened. Rocha asked A.T. what she had meant about her father treating her like a wife. A.T. answered that petitioner did "nasties" to her. Rocha asked her to explain. A.T. told Rocha that petitioner had dragged her by the arms into the bedroom, taken off her clothes, and put her on the bed. Although she had tried to keep her legs crossed, petitioner had forced them open. A.T. then said that petitioner had lain on top of her, and she had gotten a sharp pain "down there," in her abdomen. A.T. also said that she had wiped herself afterwards and there was blood on the tissue. J.A. 12; V Tr. 222-223; VI-A Tr. 407-408.

Rocha and Padilla contacted the police. On August 29, Child Protection Services caseworker Kae Ecklebarger interviewed A.T. Ecklebarger asked A.T. if she knew why she was there; A.T. replied because of what "Matthew" had done to her. V Tr. 317. A.T. said that petitioner had "put his balls" in her. Ecklebarger asked A.T. if she could remember one specific time. A.T. said she could remember one time especially clearly. She said that her father had told her to take off her clothes, and when she refused, petitioner removed her panties, put her on the floor, and "put his balls" in her. Ecklebarger brought out anatomically correct dolls and asked A.T. to show what petitioner had done. A.T. undressed the male doll and removed the panties from the female doll, placed the female doll on its back, put the male doll on top of it, and took the penis of the male doll and tried to insert it into the vaginal area of the female doll. She then moved the male doll up and down on the female doll. J.A. 17.

A.T. also told Ecklebarger that petitioner had kissed her all over her body, including on her vaginal area, which she indicated by pointing to the girl doll. Her father also asked her to touch him, A.T. said, but she refused. When Ecklebarger asked A.T. where her father had asked her to touch him, A.T. pointed to the penis on the male doll. A.T. further said that she went to the bathroom afterwards and wiped herself, and that there was blood on the tissue. A.T. kept the tissue and showed it to her grandmother and aunt, saying, "Look what Matthew did to me." A.T.'s grandmother confronted petitioner, who turned to A.T. and said, "It's all your fault." A.T. answered, "No, it isn't, it's all your fault." J.A. 18.

Ecklebarger referred A.T. to Dr. Karen Kuper, a local pediatrician. During Kuper's initial interview of A.T., on September 14, 1990, she asked A.T. whether anyone had ever touched her in a way that hurt or was scary. A.T. answered, "Just my dad." When Kuper asked where her father had touched her, A.T. pointed to the vaginal area on an ordinary doll in Dr. Kuper's office. A.T. also said that petitioner had "put his fingers inside me." When Kuper asked whether her father had touched her with anything else, A.T. replied, "His thing." She would not say what "his thing" was, but she pointed to the doll's genital area. Kuper asked what her father had done with his "thing"; A.T. said he had "put it inside of me," again pointing to the doll's vaginal area. J.A. 15.

On examining A.T., Kuper observed that A.T.'s vaginal opening was enlarged, and that A.T. had an abnormally thin amount of hymenal tissue for a girl of her age. Kuper concluded that the size of the vaginal opening and the small amount of hymenal tissue were

consistent with the penetration of the vagina by an object. V Tr. 259.

On September 21, 1990, A.T. saw Dr. Laura Reich, another pediatrician, for treatment of a rash on her thighs. According to Reich, A.T. "was extremely calm during the examination and very friendly." During the examination, A.T. told Reich that petitioner had put his "thing" in her. After learning that A.T. already had spoken to Child Protection Services, Reich did not question her further. J.A. 16. Reich's examination of A.T. revealed that her hymen was not intact and that her vaginal opening was abnormally large. Reich concluded that A.T. "had definitely had penile penetration in her vaginal area." V Tr. 294.

Dr. Jean Spiegel, a pediatrician and expert in child sexual abuse, examined A.T. the next year, on September 3, 1991. Spiegel found that A.T. had a very thin rim of hymenal tissue and a large hymenal opening for her age, which findings were consistent with chronic vaginal penetration. Spiegel concluded that repetitive penetration by a penis, finger, or similar object could have caused the size of A.T.'s vaginal opening. VI-A Tr. 472-473, 494, 500, 503-504, 507-508. Spiegel also spoke with A.T. outside her mother's presence. VI-A Tr. 509. A.T. told Spiegel that petitioner had touched her breasts and "front privates," as well as her bottom. J.A. 20.

B. Trial Proceedings

At trial, A.T. was the government's first witness. She was six and one-half years old at the time. The judge questioned her to determine whether she was competent to testify. IV Tr. 69-72, 78-79. On direct examination, she described petitioner's abuse through

testimony and the use of dolls, and by pointing to body parts. See IV Tr. 83-94.

A.T. was then cross-examined by defense counsel. The course of defense counsel's questioning suggested that A.T. was fabricating the allegations of abuse out of a wish to live with her mother rather than her father.[1] For example, A.T. testified, in response to defense questions, that she had nobody to play with in New Mexico, where petitioner lived, J.A. 4, and that she missed her mother when she was in New Mexico with petitioner, but did not miss petitioner when she was with her mother, J.A. 5. When asked on cross-examination what she thought would happen to her mother and to petitioner when she went to court, A.T. answered that she might be returned to petitioner, which she feared, and that her mother might go to jail. J.A. 5-6.

After the end of A.T.'s testimony, the government presented as witnesses the six persons who had heard A.T.'s out-of-court statements describing petitioner's abuse. The government argued that "in this case [the statements are] offered to rebut the inference of an improper influence or motive by this child." J.A. 6. This inference arose after the defense counsel told the jury in the opening statement that A.T. "was to give false testimony because of a custody battle," J.A. 7, and after the cross-examination of A.T., which

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[1] Defense counsel made the same contention in her opening statement, telling the jury that "this case is about a false accusation made during a child custody case, and that's going to be the evidence that you are going to hear in this case." IV Tr. 59. Counsel also emphasized that "two days before [Padilla] was supposed to bring [A.T.] back to the tribal court custody hearing, is when this first allegation is made * * * to the babysitter." IV Tr. 62.

raised the charge that A.T. was lying because she preferred to live with her mother rather than her father, *ibid.*

To determine whether these statements were admissible, the court heard the testimony of Lisa Rocha outside the presence of the jury. See V Tr. 195-211. In that testimony, Rocha related A.T.'s statements to her, and explained how A.T. had made the August 22 statement "out of the blue," without prompting from Rocha. V Tr. 202. Rocha also explained that A.T. had refused to elaborate on her first statement, and that when Rocha asked her to explain what she had meant, A.T. "took off running again to the room to play." V Tr. 198.[2] In explaining the context of the August 27 statement, Rocha testified that she did not ask A.T. specific questions in detail about the abuse, but "just asked [A.T.] what she meant, and then she explained everything to me. I did not ask her, Did he do this, did he do that? She's the one that told me what he did." V Tr. 205-206.

After hearing this proffer, the district court admitted all of A.T.'s statements to Rocha on both August 22 and 27, including those overheard by Padilla on August 27, under Rule 801(d)(1)(B). J.A. 9, 11.[3] The court also admitted the statements made on August 22 (but not those on August 27) under Rule 803(24), the "catch-all" exception to the hearsay rule. J.A. 9.[4]

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[2] During her testimony before the jury, Rocha also stated that she did not know that Padilla and petitioner were in the middle of a custody fight at the time. V Tr. 240.

[3] When Padilla testified later in the trial, the district court confirmed its ruling admitting the portion of A.T.'s August 27 statement overheard by Padilla. J.A. 19-20.

[4] Rule 803(24) provides that extrajudicial statements may be admitted if, among other things, the statements have "equivalent circumstantial guarantees of trustworthiness" to those of statements admissible under the other exceptions to the hearsay rule in Rule 803. The court ruled that the August 22 statement had circumstantial guarantees of trustworthiness equivalent to those that would make a hearsay statement admissible under Rule 803(3). J.A. 9. Rule 803(3) permits the introduction of an out-of-court statement "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)."

As to Rule 801(d)(1)(B), the district court agreed with the government that the defense had implicitly charged that A.T. was making up her testimony because of an improper motive, namely, her preference to live with her mother rather than her father. J.A. 9. Rocha then testified before the jury about A.T.'s statements to her describing petitioner's abuse.[5]

The government then sought to introduce A.T.'s out-of-court statement to Karen Kuper, through Kuper's testimony, under Rule 801(d)(1)(B) and Rule 803(4), the exception to the hearsay rule for statements made for purposes of medical diagnosis. The district court initially admitted the statement only under Rule 801(d)(1)(B), remarking to defense counsel that the statement would not have been so admitted unless "you hadn't thrust it in that direction, that is recent fabrication or improper motive, and that is

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[5] Although petitioner's attorneys objected to the introduction of A.T.'s statements through Rocha's testimony as inadmissible hearsay, they did not specifically contend at trial that the statements should be excluded because they were made after the alleged motive to lie arose. Defense counsel argued to the district court that its ruling was overbroad, and that the ruling would effectively allow the admission of prior consistent statements in every case, because the charge of witness fabrication is made in every case. J.A. 10.

implied in the manner in which you conducted your examination." J.A. 14. Kuper then testified about her examination of A.T. and A.T.'s statements to her describing the abuse. J.A. 14-15. She explained that she had not asked A.T. leading questions, J.A. 15, and that Padilla had not told her what to ask A.T., V Tr. 258. On cross-examination, she further explained that, when she interviewed children about abuse, she watched for coaching from parents, V Tr. 281, and that she had not asked A.T. questions about her fear of losing her mother or going back to her father, V Tr. 282-283. After the completion of her testimony, the district court reaffirmed its admission of the statement under Rule 801(d)(1)(B) and also ruled it admissible under Rule 803(4). V Tr. 288.

The testimony by the next witness, Laura Reich, presented the same evidentiary issues as those raised by Kuper's testimony. Defense counsel renewed their objection, which was implicitly overruled by the court. J.A. 15-16. In addition to explaining her conclusions from her physical examination of A.T., Reich related A.T.'s statement that her father "had put his thing in her." J.A. 16. Reich testified that, at the time of the examination, she did not know that A.T. was involved in a custody dispute. V Tr. 302.

The government offered the testimony of Kae Ecklebarger about A.T.'s statements to her under Rule 801(d)(1)(B) and Rule 803(24). V Tr. 166, 170.[6]

[6] The court of appeals believed that the government failed to offer Ecklebarger's testimony expressly as nonhearsay under Rule 801(d)(1)(B) but nevertheless found it admissible under that Rule. J.A. 27. Although the transcript of the trial is not absolutely clear on this point, both sides plainly understood in the context of the trial that the government was offering Ecklebarger's testimony under both Rules 801 and 803. As to Rule 803(24), the government argued that A.T.'s statements to Ecklebarger, a social worker, were similar to statements made for purposes of medical diagnosis, which are admissible under Rule 803(4). As the government pointed out, A.T.'s relationship with Ecklebarger was similar to that with Kuper, in that both "help[] kids," and A.T. confided in both even though she would not tell her mother about the abuse by petitioner. V Tr. 176.

Although the court overruled defense counsel's objection to these statements, the basis for its ruling was not clear. J.A. 16. In her testimony, Ecklebarger explained that she had not asked A.T. leading questions, that Padilla had not been present during the interview, and that she and A.T. had talked about the difference between stories and things that really happened. V Tr. 315-316, 337. Ecklebarger also testified that, although she was aware at the time of the interview that A.T. was involved in a custody dispute, she believed that there was a very low incidence of false reporting of sexual abuse by children. V Tr. 338.

Finally, the government introduced testimony by the third pediatrician, Jean Spiegel, about A.T.'s statements to her. J.A. 20. Defense counsel made no specific objection on hearsay grounds to this testimony.

C. Appellate Proceedings

On appeal, petitioner argued that all of A.T.'s statements should have been excluded under Rule 801(d)(1)(B) because they were made after A.T.'s alleged motive to lie arose. The court of appeals ruled that all the statements were admissible under Rule 801(d)(1)(B), and it did not reach the question of their admissibility under Rule 803(4) or 803(24). J.A. 27.

The court of appeals first rejected petitioner's claim that A.T. was not "subject to cross-examination" concerning her prior statements about sexual abuse, as required by Rule 801(d)(1)(B). J.A. 28-31. The court concluded that, "[a]lthough A.T. was reluctant to answer some questions and testified that she did not remember making certain statements, she did ultimately answer most of defense counsel's questions," and that petitioner had failed to "identify any specific topic or issue that he feels was important but about which A.T. would not respond." J.A. 31. The court of appeals also upheld the district court's ruling that petitioner had implied, through cross-examination, that A.T. had fabricated the sexual abuse allegations to remain with her mother. J.A. 32. The court noted that "[d]efense counsel questioned A.T. at length regarding her preference for living with her mother," and that A.T. testified "that she had friends in Colorado but none in New Mexico, and that she missed her mother when in New Mexico but did not miss her father when in Colorado." *Ibid.*

The court of appeals then rejected petitioner's contention that A.T.'s prior statements were inadmissible solely because they did not predate the purported motive to fabricate. The court reasoned that petitioner's argument, which asserts that statements made after a motive to lie arises have no probative value, has more to do with relevancy than with the concerns about reliability underlying the hearsay rules. See J.A. 34. In addition, the court observed, "even as a function of relevance, the pre-motive rule is clearly too broad: a per se rule is untenable because it is simply not true that an individual with a motive to lie always will do so. Rather, the relevance of the prior consistent statement is more accurately determined

by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie." *Ibid.*

The court of appeals nevertheless recognized that, in some cases, "prior consistent statements made after a strong motive to lie has arisen may evidence only that the declarant is a consistent liar." J.A. 34. The court therefore held that, in cases involving prior consistent statements made after the alleged motive to lie arose, courts should consider whether the statement "has probative value apart from its repetition." *Ibid.* In this case, the court found that "A.T.'s consistent statements do carry probative force apart from mere repetition," J.A. 37, because A.T.'s initial statement to her baby-sitter was spontaneous, and because there was no reason to believe that A.T. had made the statements out of a "calculated scheme to deceive," or even that A.T. "possessed the ability to appreciate the causal relationships inherent in the conception and implementation of such a scheme," J.A. 36. Given the circumstances in which A.T.'s statements were made, the court of appeals concluded that the district court had not erred in admitting those statements.[7]

This Court granted certiorari, limited to the question of the admissibility of the statements under Rule 801(d)(1)(B). J.A. 42.

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[7] The court of appeals also rejected petitioner's arguments that the admission of A.T.'s prior statements violated the Confrontation Clause, J.A. 37-39, that the district court improperly permitted the prosecutor to use leading questions in examining A.T., J.A. 39-40, and that cumulative error required reversal, J.A. 40.

SUMMARY OF ARGUMENT

I. Federal Rule of Evidence 801(d)(1)(B) does not require the offering party to show, or the district court to find, that a testifying witness's prior consistent statement "offered to rebut [a] * * * charge against the declarant of recent fabrication or improper influence or motive" was made before the improper motive arose. The plain language of the Rule mentions nothing about the timing of the statement as a prerequisite to admission. The Rule's use of the word "rebut" does not suggest such a "pre-motive" rule, since the Rule requires only that the statement be "offered [by a party] to rebut" the charge of improper motive, not that the district court find that the statement actually rebuts the charge. The pre-motive rule advocated by petitioner would require the district court to screen out much relevant evidence from the jury's consideration, and would thus encroach on the jury's traditional function of credibility determination.

Moreover, the word "rebut" does not mean that the prior consistent statement must be offered to refute completely the charge of improper motive. A statement can "rebut," or take away the force of, such a charge, even if it does so only partially, and in conjunction with other evidence in the case. Testimony and cross-examination about the circumstances under which the statements were made can illuminate for the jury whether, and to what extent, it should credit the statement offered in rebuttal.

Nor is the pre-motive rule compelled by the Rule's use of the word "recent," since the Rule's reference to "recent fabrication" is not properly read to refer to rebuttal of a "recent * * * improper influence or

motive," as petitioner suggests. The notion of a "recent motive" is awkward, since motives such as biases and influences typically do not arise full-blown on particular dates, but tend to be variable over time and may be eclipsed by countervailing influences. Petitioner's argument would encourage parties to manipulate the concept of a "recent motive" and would replace the truth-finding function of the jury with an effort to exclude evidence through arbitrary rules.

The standard for admissibility of evidence offered to rebut a charge of improper motive is found in Rule 401, the Federal Rules' relevancy provision. A prior consistent statement should be admitted if it is relevant to rebut the charge of improper motive, which it would be if, for example, it were made under circumstances where it was unlikely that it was the product of the improper motive. In that case, the prior consistent statement would make it more probable that the witness's in-court testimony also was not the product of an improper motive. This simple relevancy rule is more consistent with the thrust of the Federal Rules of Evidence than is petitioner's "super-relevancy" rule, which would be a marked departure from the liberal relevancy provisions of the Rules.

Although a majority of common law courts accepted the pre-motive rule before the adoption of the Federal Rules of Evidence, that historical consideration does not signify that the Rules incorporated a pre-motive rule. From the inception of the pre-motive rule, courts perceived the problems of prior consistent statements to be ones of weight and credibility. Under the Federal Rules, these are matters for the finder of fact to judge. Moreover, the Rules were adopted after a generation of academic criticism of the hearsay rule's exclusion of witnesses' prior state-

ments and a decade in which federal courts were sanctioning departures from the pre-motive rule.

II. Under the relevancy standard of Rule 401, the district court properly admitted A.T.'s prior consistent statements in this case, given the circumstances under which all of the statements were made. Even though petitioner's counsel charged that A.T. was fabricating her story on the stand out of a preference to live with her mother, her statements to three pediatricians and a social worker were unlikely to have been influenced by this motive, since A.T. likely would not have believed that they could influence the custody decision. Her initial statement to her baby-sitter was completely spontaneous, and her unwillingness to tell her mother anything about petitioner's abuse strongly suggests that she did not fabricate her story out of preference for her mother.

ARGUMENT

I. PRIOR CONSISTENT STATEMENTS OFFERED TO REBUT A CHARGE OF IMPROPER INFLUENCE OR MOTIVE MAY BE ADMITTED WITHOUT A SHOWING THAT THE STATEMENTS WERE MADE BEFORE THE INFLUENCE OR MOTIVE AROSE

A. Rule 801(d)(1)(B) Does Not Contain A Pre-Motive Rule Of Admissibility

1. Rule 801(d)(1)(B) of the Federal Rules of Evidence provides that a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of

recent fabrication or improper influence or motive." The Rule gives these out-of-court statements substantive effect because they "satisf[y] standards of relevancy and reliability," 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(1)[01], at 801-133 (1993), and are "free of the danger of abuse," C. McCormick, *McCormick on Evidence* § 251, at 603 (2d ed. 1972). When the declarant testifies in the presence of the jury and is subject to cross-examination about his or her extrajudicial statements as well as the in-court testimony, the principal danger presented by hearsay, the lack of opportunity for cross-examination, is absent. See Fed. R. Evid. Art. VIII advisory committee's note.

Nothing in the language of Rule 801(d)(1)(B) conditions the admissibility of a declarant's prior consistent statement on a showing, or a finding by the court, that the statement was made before a particular time. The unambiguous language of the Rule establishes only two prerequisites to the admission of such a statement; it must be "consistent" with the declarant's testimony, and it must be "offered to rebut" a charge that the witness is lying on the stand. If the statement satisfies these two conditions and is relevant to rebut the charge of improper motive, then it is admissible.

Because the Rule says nothing about the timing of the statement, there is no basis for reading into it a prerequisite to its application that the drafters did not provide. In enacting the Federal Rules of Evidence, Congress "made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, [the courts] must enforce the words that it enacted." *United States* v. *Salerno*, 112 S. Ct. 2503, 2507 (1992).

Petitioner contends, however, that the blanket rule he proposes can be found in the Rule's use of the word "rebut." Pet. Br. 14-27. According to petitioner, even though a consistent statement made after a motive to fabricate arises may be "relevant" to the allegation of fabrication, *id.* at 11, such a statement would not completely defeat the allegation, and therefore would not "rebut" the charge of fabrication. Petitioner argues that the Rule requires the trial court to make a finding, based on a preponderance of the evidence, that a prior consistent statement "rebuts" a charged motive to lie before admitting the statement. *Id.* at 31. Petitioner's reliance on the word "rebut" has several defects, however.

First, for the statement to be admissible, the Rule requires only that the statement be "*offered* to rebut" the charge, not that the statement, in fact, "rebut" the charge. If the district judge were required to find that the statement actually rebutted the charge of fabrication, then the Rule would have been drafted to provide that a statement is not hearsay if it is "consistent with the declarant's testimony *and rebuts* an express or implied charge against the declarant of recent fabrication or improper influence or motive." As actually written, however, the Rule gives the parties leeway to introduce evidence that tends to rebut a charge of fabrication, and it retains the jury's role in evaluating the weight and credibility of that evidence—not merely in isolation, but in light of all the evidence.[8]

[8] Of course, the court could exclude a prior statement that had nothing to do with the charged motive under Rule 402, which prohibits the introduction of irrelevant evidence. Moreover, Rule 801(d)(1)(B) requires that, to be admissible, the prior statement be "consistent with the declarant's testimony." These two safeguards suffice to prevent the introduction of irrelevant evidence.

Under petitioner's interpretation, the judge would encroach on the jury's domain of evaluating the credibility of witnesses. The purpose of Rule 801(d)(1)(B) is to permit parties to respond to their adversaries' assaults on their witnesses' credibility. In many cases, the most effective way, indeed the only way, that the offering party can rehabilitate its witness in the eyes of the jury is by introducing one or more prior consistent statements. In such cases, determining whether the prior consistent statements fully rebut the charge of improper motive is the same thing as deciding whether the testifying witness has told the truth. Petitioner's rule would take this function of credibility determination away from the jury—an extraordinary deviation from the principle that "a judge in our system does not have the right to prevent evidence from getting to the jury merely because he does not think it deserves to be given much weight. * * * [The judge] may have to balance weight against prejudice in ruling on objections under Fed.R.Evid. 403, but he may not screen witnesses simply to decide whether their testimony is persuasive." *Western Indus.* v. *Newcor Canada Ltd.*, 739 F.2d 1198, 1202 (7th Cir. 1984).

The language of Rule 801(d)(1)(B) distinguishes this case from *Bourjaily* v. *United States*, 483 U.S. 171 (1987), on which petitioner relies. Pet. Br. 31. *Bourjaily* concerned Rule 801(d)(2)(E), which provides that a statement is not hearsay if it is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." In light of the

text of Rule 801(d)(2)(E), this Court concluded that, before admitting such a statement, the district courts must find by a preponderance of the evidence that, in fact, "there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'during the course and in furtherance of the conspiracy.'" 483 U.S. at 175. But Rule 801(d)(1)(B) provides that a statement is admissible, not if it "rebuts" a charge of fabrication, but if it is consistent with the declarant's testimony and is "offered to rebut" the charge of fabrication. This significant textual difference compels the conclusion that the district court should not itself determine whether the statement conclusively "rebuts" the charge of an improper influence or motive. That is a decision ultimately to be made by the trier of fact, on the basis of all the evidence before it.

2. Petitioner's contention also ignores the fact that a statement made after a motive to lie has arisen can nevertheless rebut a charge of improper motive. Motives to fabricate do not always operate like an "off-on" switch, completely tainting statements made after they arise. A supposedly improper influence or motive can affect a witness in different ways at different times, and to a greater or lesser degree, depending on the circumstances.[9] The effect will depend on, among other things, the strength of the

[9] See, *e.g.*, *United States* v. *Miller*, 874 F.2d 1255, 1275 (9th Cir. 1989) (suggesting that a desire to gain revenge for breaking off an affair, while "not negligible, * * * is not nearly as strong as the very powerful motive that criminal defendants may feel to give exculpatory testimony"); *United States* v. *Sampol*, 636 F.2d 621, 670-674 (D.C. Cir. 1980) (observing that witnesses can simultaneously have powerful motives to lie and to tell the truth, and these motives can fluctuate).

alleged motive to lie, the witness's force of character, and the likelihood that the declarant would be able to foresee the effect of giving the statement. The context in which the statement was made can especially illuminate whether, and to what extent, the statement persuasively rebuts the charge of fabrication.[10] All these matters bear on the weight to be given to the witness's extrajudicial statements and can be explored on cross-examination. The jury can evaluate them all as part of its assessment of the witness's credibility. But the per se rule advocated by petitioner would deprive the jury of much evidence that could assist it in evaluating whether a witness was testifying truthfully.

It may be true that, in some cases, a statement made before a motive to lie arose would *completely* rebut a charge of fabrication based on that motive. But the language of the Rule does not impose such a strict requirement, and it is not inherent in the word "rebut." Rebuttal of an argument can be a matter of degree.[11] As petitioner points out, to "rebut" has been defined as to "take away the effect of something." *Black's Law Dictionary* 1267 (6th ed. 1990). A prior statement can "take away the effect" of a charge of an improper motive, at least partially, even when it does not utterly defeat the charge. "Rebut" has also been

[10] See, *e.g.*, *United States* v. *Parry*, 649 F.2d 292, 295-296 (5th Cir. 1981) (exculpatory statement that defendant made to his mother should have been admitted, even though defendant already had a motive to fabricate).

[11] For example, after a defendant completes his case in a criminal trial, the government is entitled to offer what is usually referred to as "rebuttal" evidence. It has never been suggested, however, that the government is limited to introducing evidence that completely destroys the defense.

defined as "to contradict, meet, or oppose by formal legal argument, plea, or countervailing proof," "to expose the falsity of," and "to make or put in an answer or counter proof." *Webster's Third New International Dictionary* 1893 (1986). None of these definitions suggests that a single statement must completely overthrow the effect of an argument in order to rebut it. As this Court knows from its own practice, rebuttal argument can be entirely proper even when it is less than devastating and ultimately unpersuasive. There is no reason to believe that Rule 801(d)(1)(B) incorporates a standard more exacting than the common understanding of the meaning of "offered to rebut."

Petitioner's rule, by contrast, would require the court to decide whether each statement, by itself, would completely defeat the charge of improper motive, instead of considering whether the statement, in conjunction with the other evidence in the case, would lead the jury to a full evaluation of the witness's credibility. This contention that a single piece of evidence must, by itself, completely rebut an argument reflects an unrealistic view of the nature of evidence. As Professor Charles McCormick wrote, "A brick is not a wall," see Fed. R. Evid. 401 advisory committee's note; one piece of evidence cannot be expected to do all of a party's work. Even if no single one of several prior consistent statements, considered in isolation, would completely refute a contention that a witness was lying on the stand, the fuller picture of the witness's prior story, given by the pattern of her statements over time, may convince a jury that the witness's in-court testimony is truthful and that the impeachment is misdirected.

This case well exemplifies why petitioner's construction of "rebut" to mean "completely rebut" should be rejected. Even if any one of A.T.'s out-of-court statements, by itself, would not have conclusively demonstrated that her in-court testimony was absolutely free of an improper motive, the consistent pattern of her statements and the circumstances surrounding them may have persuaded the jury that she was not fabricating her in-court testimony out of malice against petitioner. For example, A.T. made three of her statements to pediatricians during the course of medical examinations and made a fourth to a caseworker interviewing her about the abuse. Even if A.T. disliked petitioner intensely, it is doubtful that this dislike would have caused her to repeat a fabrication during the course of a doctor's examination or an interview by a caseworker investigating the abuse. There is no reason to believe that A.T. thought that either the pediatrician or the caseworker could influence the custody decision. Her motive to lie to them was therefore very weak, even though the motive may have been in existence at the time.

3. Petitioner suggests that the pre-motive rule may also be found in the Rule's use of the word "recent," in referring to a "charge against the declarant of recent fabrication or improper influence or motive." Petitioner urges that "recent" modifies "improper influence or motive" as well as "fabrication." Pet. Br. 17-19. Petitioner would thus read the Rule to refer to rebuttal of a "recent * * * improper influence or motive," and would interpret the Rule to require that the prior consistent statement be anterior in time to the "recent motive" to be admissible.

This is a strained reading of the Rule, and the very concept of a "recent motive" is a peculiar one. Motives do not always develop, in full flower, at a specific moment. Nor is it always possible to fix a time when one can say, with complete certainty, that a witness is not affected by a motive. This is particularly true when the charge of an "improper motive" is (as here) that the witness is biased against a party. Even if A.T. might have fabricated her story because she disliked her father and preferred to live with her mother, it could be impossible to determine that her preference for her mother arose on a particular date, or that she was free of that motive before such a date.

The varying and complex nature of biases, preferences, and similar influences suggests that petitioner's argument based on "recent" is incorrect. Such motives do not necessarily operate at all times, or to the same degree, and they may be eclipsed, in part or in whole, by countervailing influences. Thus, even if a witness, such as A.T., were inclined to color her statements against someone because of a strong dislike of that person, that witness might find herself in a situation, such as a medical examination, where the bias diminished in importance but did not disappear entirely. Requiring a judge to determine that a witness's bias in favor of or against someone emerged on a particular date would be a highly artificial exercise, neither necessary nor useful to the fact-finding function of the trial. Instead, the extent to which any number of motives may have influenced a witness's statement can and should be explored on cross-examination and evaluated by the jury.

Thus, "[b]ecause of the many facets of human motivation," *Castaneda* v. *Partida*, 430 U.S. 482, 499

(1977), petitioner's proposed rule would be hard to apply, even though it purports to have the virtue of simplicity. See 4 D. Louisell & C. Mueller, *Federal Evidence* § 420, at 193-194 (1980). It is often difficult to determine when a motive or influence first appears, or whether the motive at the time the prior statement was made is the same motive that drives the witness's testimony at trial. That very problem is presented by the alleged improper motive at issue in this case. When a child dislikes her father and prefers to live with her mother, it may be impossible to say with any degree of confidence when that motive first arose, and dislike of one parent might influence statements made by a child even prior to the parents' separation.

Because of these ambiguities, a party could manipulate the pre-motive rule effectively to prevent its adversary from introducing highly relevant rebuttal evidence. In civil litigation, any prior consistent statement made before the commencement of the lawsuit but after the incident out of which the suit arose might be vulnerable under that rule. In criminal cases, defendants frequently charge that accomplices testifying for the government are motivated to lie because of promises of leniency, and the government often tries to rebut that charge by showing that the accomplice made the same statement to the police when he was first under investigation. A defendant could plausibly try to bar that evidence, relying on petitioner's per se rule, claiming that the accomplice was aware, even at a very early stage in the investigation, that the government might offer him a deal.[12] Petitioner's per se approach would

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[12] Cf. *United States* v. *Henderson*, 717 F.2d 135, 138-139 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984); *People* v. *Duvall*,

thus convert the adversary procedures and truth-seeking function of the trial into an attempt to win by excluding relevant evidence through artificial rules.

The more natural reading of the Rule is that "recent fabrication" and "improper influence or motive" refer to separate types of impeachment. This reading comports with the fact that, under the common law, courts and commentators frequently (although not invariably) distinguished between charges of "recent fabrication" and "improper influence or motive."[13] While the allegations may in some circumstances overlap, the basic difference is that a charge of recent fabrication usually implies "negative evidence that the witness did *not* speak of the matter before, at a time when it would have been natural to speak; his silence then is urged as inconsistent with his utterances now." 4 J. Wigmore, *Evidence* § 1129, at 271 (Chadbourn rev. ed. 1972). To put it another

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68 Cal. Rptr. 708, 710 (Cal. Ct. App. 1968); *State* v. *Kane*, 75 A.2d 894, 898 (N.J. Super. Ct. App. Div. 1950) (Brennan, J.) (admitting accomplice's prior statement, given after his arrest).

[13] See 4 J. Wigmore, *Evidence* § 1129, at 270 (Chadbourn rev. ed. 1972) ("Impeachment on the ground of recent contrivance must be distinguished (as it is not always) from the foregoing ground [of impeachment by bias, interest, or corruption]"); 3 J. Weinstein & M. Berger, *supra*, ¶ 607[08], at 607-115 (discussing the "two situations" as exceptions to general rule of inadmissibility); M.C. Dransfield, Annotation, *Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony*, 75 A.L.R.2d 909, 937, 939 (1961) (discussing separately "[m]otive to falsify; bias or interest" and "[c]harge of recent fabrication"); M.C. Dransfield, Annotation, *Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony*, 140 A.L.R. 21, 80, 93 (1942) (same).

way, a charge of recent fabrication involves an allegation that "the witness has made it all up," 4 D. Louisell & C. Mueller, *supra*, § 420, at 188, to meet the exigencies of the case.[14] In response to a charge of recent fabrication, the purpose of the prior consistent statement is to show that, at an earlier time, "the witness did speak and tell the same story." 4 J. Wigmore, *supra*, § 1129, at 271.

For the reasons we have explained, however, temporal considerations in themselves are often less telling in rebutting a charge of "improper influence or motive." Here, for example, petitioner has not suggested that A.T. first fabricated her story for the purpose of the criminal trial. Hence, the pattern of A.T.'s prior consistent statements, and the circumstances in which they were made, were highly relevant to the basic truth-seeking purpose of the trial.

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[14] See *Lyke* v. *Lehigh Valley R.R.*, 84 A. 595, 599 (Pa. 1912) (charge of "recent fabrication" is a charge that the plaintiff's testimony was "concocted for the purpose of the trial"); *People* v. *Walsh*, 301 P.2d 247, 251 (Cal. 1956); *People* v. *Gentry*, 76 Cal. Rptr. 336, 343-344 (Cal. Ct. App. 1969); *State* v. *Wolf*, 245 P.2d 1009, 1012 (Wash. 1952) (en banc); *Houston & T.C. Ry.* v. *Fox*, 166 S.W. 693, 695 (Tex. 1914); *Lanasa* v. *State*, 71 A. 1058, 1065 (Md. 1909); *Commonwealth* v. *Jenkins*, 76 Mass. 485, 489-490 (1858) (discussing situation where witness is alleged to have "formerly withheld or concealed the facts to which he has now testified," and identifying *Commonwealth* v. *Wilson*, 67 Mass. 337 (1854), as such a case; in *Wilson*, witness was asked on cross-examination when he was first asked about his story, and he answered, "about six weeks before," *id.* at 340). See also *Garcia* v. *Watkins*, 604 F.2d 1297 (10th Cir. 1979) ("recent fabrication" case under Federal Rules); *Tompkins* v. *Erie R.R.*, 90 F.2d 603, 605-606 (2d Cir. 1937), rev'd on other grounds, 304 U.S. 64 (1938).

B. A Pre-Motive Rule Would Be Contrary To The Overall Thrust Of The Federal Rules Of Evidence And Is Not Necessary To Prevent Abuses Suggested By Petitioner

1. Petitioner argues, in essence, that Rule 801(d)(1)(B) contains a "super-relevancy" rule categorically excluding all statements of a witness made after a motive to lie arose. That rule should apply, petitioner contends, even if those statements are relevant, within the meaning of Rule 401,[15] to rebut the charge of improper influence or motive, because those statements, by themselves, would not be conclusive on the issue of improper motive. This interpretation of Rule 801(d)(1)(B) is at odds with the basic philosophy underlying the Federal Rules of Evidence, and particularly the relevancy provisions. As this Court recently observed in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), in which it rejected an evidentiary standard requiring a heightened showing of probativeness as incompatible with the Federal Rules of Evidence, the Rules have a "liberal thrust" favoring the admission of relevant evidence, *id.* at 2794, and the consideration of all relevant evidence by the trier of fact.

Under Rule 401, relevant evidence is all evidence having "*any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (Emphasis added.) "The Rule's basic standard of relevance thus is a liberal

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[15] Federal Rule of Evidence 401 provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

one," *Daubert*, 113 S. Ct. at 2794, and Rule 401 rejects the view that any piece of evidence, by itself, must conclusively demonstrate the existence of any fact in the action. All that is required is that "the item of evidence *tend to prove* the matter sought to be proved[.]" Fed. R. Evid. 401 advisory committee's note (emphasis added). "Given the Rules' permissive backdrop," *Daubert*, 113 S. Ct. at 2794, it would be strange if the drafters intended to incorporate petitioner's "austere standard," *ibid.*, rather than the liberal one of relevancy that is dependent on the facts and circumstances of individual cases.

Under the standard of Rule 401, a prior consistent statement made after an alleged motive to lie arose would be relevant as long as it tended to prove that the witness's in-court testimony was not the product of an improper motive. An extrajudicial statement could tend to prove this by demonstrating that the witness had told a similar story at another time and under circumstances in which the jury could conclude that the charged motive was unlikely or less likely to have influenced his or her statement. Thus, in this case, A.T.'s extrajudicial statements were relevant because the circumstances under which they were uttered made it highly unlikely that the statements were the product of the alleged improper motive. Her statements to her baby-sitter were spontaneous; she was reluctant to give her baby-sitter details of the abuse or to tell her mother about the abuse at all; and her statements to her caseworker and pediatricians were made under circumstances where she would be unlikely to have thought that her statements would influence her custody. The entire pattern of her consistent story outside court also tended to prove that she told the truth on the stand.

While the standard of admissibility under Rule 401 is liberal, it is not devoid of content. The district court retains the authority to exclude statements where there is no reason to believe that the witness's motives in making them differed from those influencing the witness at trial. Rule 401 would thus prevent parties from introducing out-of-court statements uttered shortly before trial solely for the purpose of corroborating their in-court testimony. Such statements would not make it more probable that the in-court testimony was free of an improper motive. For example, Rule 401 could have prevented the government from introducing statements that A.T. made to the prosecuting attorneys during preparation for trial. Such statements would have done little, if anything, to rebut the charge that A.T. was testifying falsely because of a preference to live with her mother.

Petitioner's argument is also inconsistent with the structure of the Federal Rules, which deal separately with problems of relevancy, in Article IV, and problems of reliability of hearsay, in Article VIII. The theory underlying the rule against hearsay is not that hearsay statements, *if believed*, would not tend to prove a matter in the case (a relevancy problem), but rather that the out-of-court and uncross-examined nature of the statements prevents the jury from accurately determining whether the declarant *should be believed* (a reliability problem). "The main justification for treating [hearsay] differently from other testimonial proof must be that the trier can more readily come to a correct conclusion with respect to credibility if he observes the declarant making his statement, * * * being observed by an adverse party, and subject to almost

immediate searching cross-examination to test the various elements of his credibility." Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331, 333 (1961). If evidence does not present any hearsay danger that would prevent the trier of fact from making an accurate determination of the declarant's credibility, as is the case with prior consistent statements made by a witness who is subject to cross-examination about the statements, there is no reason in the hearsay rules themselves to exclude the evidence. The problems that petitioner perceives in "post-motive" prior consistent statements, namely problems of the weight and credibility of the statements, are not the kind of difficulties to which the Rules' hearsay provisions are directed.

2. Petitioner contends, however, that a per se rule is necessary to prevent abuses. Petitioner suggests, for example, that without his rule, the government will be able to make its case by repeating the same out-of-court accusations over and over again, through a "parade of witnesses." Pet. Br. 33. But petitioner's rule is not necessary to prevent this abuse, for Rule 401 permits the introduction of evidence only if it makes the fact to be proved more probable than it would be without the evidence. A witness who simply repeated an out-of-court statement about a fact that had already been related, in exactly the same way, by another witness would not be giving testimony that made the fact more probable than it was without that testimony. Similarly, if "an FBI agent * * * question[ed] a witness a few minutes before he takes the stand in order to elicit a prior consistent statement for just the purpose of bolstering the trial testimony," *United States* v. *Montague*, 958 F.2d 1094, 1098 (D.C. Cir. 1992), that statement would add

nothing to the witness's in-court testimony, and would be excluded as irrelevant. Rule 403 also gives the district courts authority to exclude evidence upon "considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Second, petitioner argues that a per se rule is needed to prevent "parties in both civil and criminal cases [from] manufactur[ing] statements in order to buttress the declarant's story at trial." Pet. Br. 33. This danger, however, is precisely the sort of abuse that cross-examination is well designed to expose. Since Rule 801(d)(1)(B) permits the introduction of prior consistent statements only when the declarant is subject to cross-examination, the cross-examining attorney can closely question both the declarant and the witness relating the statement about all the circumstances under which the statement was made. By doing so, the attorney can demonstrate to the jury that the statement may have been concocted for the purposes of trial—just as an attorney can demonstrate, through cross-examination, that a witness's testimony on the stand may be a "recent fabrication" contrived for the purposes of trial. Even if, as petitioner speculates (Pet. Br. 34), parties tried to route out-of-court statements through particularly credible witnesses, such as "elder statesmen and spiritual leaders," who would give the statements a veneer of credibility that they would not otherwise deserve, the attorney for the opposing party would still have available all the tools of cross-examination. Cross-examination could demonstrate that the witness barely knew the declarant or had little independent understanding of the significance of the out-of-

court statement, thus suggesting to the jury that the testimony was entitled to little weight.[16]

C. The Antecedents Of Rule 801(d)(1)(B) Do Not Warrant The Conclusion That It Incorporates A Pre-Motive Rule

Petitioner argues that Rule 801(d)(1)(B) must be read to include an absolute pre-motive rule of admissibility because, in his view, the Rule incorporated the common law rule on this issue. Pet. Br. 19-25. While petitioner is correct that the majority of common law courts adopted the pre-motive principle, that consideration does not justify a conclusion that Congress incorporated a pre-motive rule into Rule 801(d)(1)(B). The common law rule was never so absolute as petitioner suggests, and many courts viewed the question of prior consistent statements as one of relevancy, which today would be addressed under Rule 401. In addition, the Federal Rules of Evidence were adopted after a generation of strong criticism of the common law rule, and after a decade in which the federal courts were beginning to depart from it.

1. Until the end of the seventeenth century, prior consistent statements were freely admissible during a party's case in chief as substantive evidence. Even

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[16] In extreme cases, the district courts could exclude such evidence under Rule 403 because of the danger of unfair prejudice or misleading the jury. Cf. *City of New York* v. *Pullman Inc.*, 662 F.2d 910, 915 (2d Cir. 1981) (affirming exclusion under Rule 403 of government report based on hearsay because of its unwarranted "aura of special reliability and trustworthiness"), cert. denied, 454 U.S. 1164 (1982); *United States* v. *Carswell*, 922 F.2d 876, 879 (D.C. Cir. 1991) (affirming exclusion under Rule 403 of proffered testimony by expert who had only "threshold level of expertise").

after the development of the rule against hearsay, prior consistent statements continued to be admissible during a party's case in chief to corroborate a witness's testimony. See *Lutterell* v. *Reynell*, 1 Mod. Rep. 282, 283 (1670); Wigmore, *The History of the Hearsay Rule*, 17 Harv. L. Rev. 437, 446-447 (1904).

In this country, judicial hostility against the admission of prior consistent statements developed in the middle of the nineteenth century. Three cases are often cited as establishing the rule that prior consistent statements must predate an alleged motive to lie to be admissible: *Ellicott* v. *Pearl*, 35 U.S. (10 Pet.) 412 (1836); *Conrad* v. *Griffey*, 52 U.S. (11 How.) 480 (1850); and *Stewart* v. *People*, 23 Mich. 63 (1871) (Cooley, J.). Petitioner relies heavily on *Ellicott* and *Conrad*, but neither case adopted his pre-motive rule. Moreover, both *Conrad* and *Stewart* clearly treated the issue of the timing of a statement as a problem of weight and credibility, and under the Federal Rules of Evidence these matters are for the jury to evaluate.

In *Ellicott* v. *Pearl*, the plaintiffs attempted to show that the defendants were wrongfully occupying land to which the plaintiffs claimed title under a land patent. The defendants claimed a right to the land under an earlier patent (Remey patent). At issue was the validity of a survey of the Remey patent lands. To establish that the survey was erroneous, and therefore that the Remey patent did not cover their land, the plaintiffs introduced the deposition of one of the surveyors, who explained that, in his survey, he confused two creeks crossing the area. 35 U.S. (10 Pet.) at 419-421 (statement of case). To impeach this testimony, the tenants introduced evidence of prior inconsistent statements by the surveyor, to the effect that the survey was correct. *Id.* at 439. The

plaintiffs, in rebuttal, attempted to introduce prior consistent statements by the surveyor. The trial court excluded the prior consistent statements.

This Court affirmed the exclusion of the evidence, stating that the unsworn prior consistent statements were not admissible to corroborate the surveyor's sworn deposition because "[h]is testimony under oath is better evidence than his confirmatory declarations, not under oath; and the repetition of his assertion does not carry his credibility further, if so far, as his oath." 34 U.S. (10 Pet.) at 439. The Court also stated, in dicta, that there were exceptions to the rule against the admission of prior consistent statements to corroborate a witness's testimony, "as, where the testimony is assailed as a fabrication of recent date, or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted." *Ibid.*

Ellicott is not a helpful guidepost for this case. First, the surveyor did not testify at trial; his impeached deposition testimony was itself hearsay. *Ellicott* is thus quite unlike cases arising under Rule 801(d)(1)(B), including this one, where the out-of-court declarant testifies and is subject to cross-examination, and it is of little relevance in deciding issues that arise under the hearsay rule in the Federal Rules of Evidence, which is principally grounded in concerns about the opportunity for cross-examination of the declarant. See Fed. R. Evid. 801 advisory committee's note. Second, the court's dictum discussing other situations in which prior consistent statements might be received as evidence did not purport to set forth all the contexts in which such statements would be admissible. Third, *Ellicott*

did not even address the precise issue presented in this case.[17]

In *Conrad* v. *Griffey*, the manufacturer of a sugar mill brought suit against a planter who had ordered the mill's construction. The planter defended on the ground that the mill was defectively made and installed. The plaintiff introduced into evidence interrogatories by the engineer who had supervised the construction, in which he testified that the materials and labor were workmanlike. The defendant impeached the engineer by introducing statements he had made to others, shortly after an accident at the mill, to the effect that the mill was defectively built. To corroborate the engineer's interrogatory answers, the manufacturer introduced an affidavit and an unsworn statement by the engineer, declaring that the mill was properly constructed.

Although observing that "[t]he practice on this subject * * * differ[s] much in different States," 52 U.S. (11 How.) at 490, and that, in several States, prior consistent statements were admitted "without reference to their priority" in time to prior inconsistent statements, *id.* at 490-491, this Court reversed and held that the affidavit and unsworn out-of-court statement should have been excluded. The Court reasoned that out-of-court consistent statements made after inconsistent statements may well be made

[17] *Ellicott* did not concern introduction of prior consistent statements after a charge against a witness of improper motive, as in this case, but rather prior consistent statements in the different context of impeachment of a witness through his prior inconsistent statements. The rule of *Ellicott*, that the consistent statement must predate the inconsistent statement to be admissible, never became the general rule in this country. See 4 J. Wigmore, *supra*, § 1127, at 267.

"for the very purpose of counteracting those first uttered," which "impairs their force and credibility." *Id.* at 491-492.[18]

The Court thus based its ruling on doubts about the credibility and weight of prior consistent statements, in the particular context of statements contradicting a prior inconsistent statement. However, *Conrad*'s indication that some prior consistent statements should be excluded because of concerns about their credibility and weight has been superseded by the more liberal relevancy standard of Rule 401. See pp. 28-30, *supra*. Indeed, both *Conrad* and *Ellicott* would be decided differently under the Federal Rules of Evidence.[19]

[18] As in *Ellicott*, the declarant in *Conrad* was not subject to cross-examination. Also, as in *Ellicott*, the Court was not presented with a consistent statement made to rebut a charge of improper motive, but rather a consistent statement offered in response to a prior inconsistent statement. The "pre-motive" issue presented in this case could not have been dispositive in *Conrad*, because one of the prior consistent statements made by the engineer, the affidavit, was executed before the motive arose, when the manufacturer filed his lawsuit. The affidavit was executed on April 3, 1846 (52 U.S. (11 How.) at 484-485 (statement of case)), and the lawsuit was filed on December 23, 1846 (*id.* at 481 (statement of case)). The accident at the mill took place in November, 1845 (*id.* at 481-482 (statement of case)), and the engineer's prior inconsistent statements were made "just after the * * * accident" (*id.* at 482 (statement of case)).

[19] In both cases, the prior consistent statements would be admissible under Rule 806. Under that Rule, the credibility of a hearsay declarant may be attacked, and, if attacked, supported, "by any evidence which would be admissible for those purposes if [the] declarant had testified as a witness." As explained in note 24, *infra*, even those circuits that have adopted petitioner's pre-motive rule permit the introduction of

The view that prior consistent statements present problems of weight and credibility is also reflected in *Stewart* v. *People*, in which the Michigan Supreme Court, per Justice Cooley, addressed basically the same issue as that presented in *Ellicott* and *Conrad* but came to a different result. The court affirmed the admissibility of testimony about the contents of a letter, written by the State's principal witness against the defendant, in which the writer, by implication, identified the defendant as a participant in a scheme to steal silverware. 23 Mich. at 64, 66-67 (statement of case). The contents of the letter were offered to rebut a prior inconsistent statement by the writer, denying that the defendant was involved in the scheme. *Id.* at 64 (statement of case).

After observing that the credibility of a witness was fundamentally an issue for the jury to decide, 23 Mich. at 75, the court concluded that "[t]he proper test for the admissibility of evidence ought to be, we think, whether it has a tendency to affect belief in the mind of a reasonably cautious person," *ibid.*—a test close to, though perhaps not identical with, the test incorporated in the relevancy rules of the Federal Rules of Evidence. The court observed that, in many circumstances, the fact that a witness "has always previously given a consistent account of the transaction in question" might be relevant to the jury's consideration. *Id.* at 75-76. Also, "[t]he tender age of the principal witness might sometimes be an important consideration." *Id.* at 76. The court concluded that "[i]t is impossible to lay down any arbitrary rule which could be properly applied to every case in which

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statements made after the motive to lie arose for the limited purpose of rehabilitating the witness's credibility.

this question could arise," and that the trial court's discretion in this matter "ought not to be set aside except in a clear case of abuse." *Ibid.* This reasoning, we submit, is more consistent with the policies underlying the Federal Rules of Evidence than is petitioner's suggested rule.

From the very beginning, therefore, courts considered the problem of prior consistent statements to be one of weight and credibility. Nevertheless, petitioner is correct that the majority rule, as developed in the latter half of the nineteenth century, was that prior consistent statements offered to rebut a charge of improper motive were admissible only if the statements were made before the motive arose. This was not the universal rule, however. Some decisions characterized the rule of admissibility as a more broad and flexible one, under which prior consistent statements could be admitted if they were made under circumstances where it was unlikely that an improper motive would have influenced the statement.[20]

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[20] See, *e.g.*, *Waller* v. *People*, 70 N.E. 681, 682 (Ill. 1904) ("[P]roof that [the witness] gave a similar account of the transaction when the motive did not exist, *or before the effect of the account could be foreseen*, is admissible.") (emphasis added); *In re McClellan's Estate*, 111 N.W. 540, 543 (S.D. 1907) (similar); *Sweazey* v. *Valley Transport, Inc.*, 107 P.2d 567, 572 (Wash. 1940) (similar, and describing the problem as one of relevancy); *State* v. *George*, 30 N.C. 324, 328 (1848) (rejecting pre-motive rule, holding prior consistent statements admissible after a witness's credibility is attacked, and observing that pre-motive rule "applies more properly to the *weight* than to the *competency* of the testimony"); see also *Brookbank* v. *State ex rel. Murphy*, 55 Ind. 169, 172 (1876) (prior consistent statements admissible even if made after prior inconsistent statements); *Henderson* v. *Jones*, 10 Serg. & Rawle 322 (Pa. 1823)

2. Beginning in the 1940's, the exclusion of prior statements of a witness came under strong criticism from academic commentators. Their point was that prior statements of a witness who testified at trial and was subject to cross-examination did not present a hearsay problem. The fundamental insight supporting this conclusion was that the true justification for the exclusion of hearsay was "the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported by the witness." C. McCormick, *Law of Evidence* § 224, at 458 (1954); see also Morgan, *The Hearsay Rule*, 12 Wash. L. Rev. 1, 4 (1937); Wheaton, *What Is Hearsay?*, 46 Iowa L. Rev. 210, 220-221 (1961). When, in cases such as the present one, the declarant testified and could be cross-examined about her out-of-court statements as well as her in-court testimony, the policies behind the rule against hearsay presented no reason to exclude the extrajudicial statements. See 3 J. Wigmore, *Evidence* § 1018, at 688 (3d ed. 1940); J. Maguire, *Evidence: Common Sense and Common Law* 62 (1947); Morgan, *The Hearsay Rule*, *supra*, 12 Wash. L. Rev. at 8; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 192 (1948); Falknor, *The Hearsay Rule and Its Exceptions*, 2 UCLA L. Rev. 43, 52-53 (1954); Weinstein, *Probative Force of Hearsay*, *supra*, 46 Iowa L. Rev. at 333 (calling characterization of extrajudicial statements of testifying witnesses as hearsay a "practical absurdity").[21] In short, hearsay

(admitting prior consistent statement after evidence admitted to impeach witness's character, without discussion of timing).

[21] These criticisms were reflected in the American Law Institute's (ALI) Model Code of Evidence Rule 503(b) (1942), which provided that "[e]vidence of a hearsay declaration is admissible if the judge finds that the declarant * * * is present and subject to cross-examination." In proposing this liberalization of the hearsay rule, the ALI observed that "the declarant is always present and subject to cross-examination," and that "the adversary is fully protected and the jury is in a favorable position to place a fair value upon the declaration in combination with [the] declarant's present testimony." American Law Institute, Model Code of Evidence Rule 503 comment b, at 234 (1942). The ALI also suggested (*ibid.*) that, if the increment of probative value added by the extrajudicial statement would be slight, it could be excluded under a separate, relevancy rule (ALI Model Rule 303), similar to the current Rule 403 of the Federal Rules of Evidence. Similarly, Rule 63(1) of the Uniform Rules of Evidence, which was adopted by the National Conference of Commissioners on Uniform State Laws in 1953, provided for the admissibility as substantive evidence of "[a] statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness."

was recognized to present problems of reliability, rather than relevance and probative value.

These criticisms had effect in the decade preceding the adoption of the Federal Rules of Evidence. Even when district courts did not strictly follow the rules governing prior consistent statements, appellate courts were reluctant to reverse, and they increasingly regarded the admission of prior consistent statements to be within the broad discretion of the district courts. Several courts eschewed a mechanical application of the pre-motive rule "in favor of a more flexible rule which would admit evidence of prior consistent statements when, under the circumstances of the case, they would have probative value and would, therefore, aid the jury in judging

credibility." 3 J. Weinstein & M. Berger, *supra*, ¶ 607[08], at 607-116.

For example, in *United States* v. *Bays*, 448 F.2d 977 (5th Cir. 1971), cert. denied, 405 U.S. 957 (1972), the court affirmed the district court's decision to admit prior consistent statements, made by a government witness following his arrest, to rebut a defense charge that the witness was motivated to lie by hopes of a light sentence. In rejecting the argument that the witness's statement was inadmissible because it was made after the motivating event (the witness's arrest), the court emphasized that the jury saw and heard all the witnesses, including the declarant, and that the prior consistent statement had probative value that could assist the jury. *Id.* at 979.

Similarly, in *Hanger* v. *United States*, 398 F.2d 91 (8th Cir. 1968), cert. denied, 393 U.S. 1119 (1969), the court of appeals upheld, as within the discretion of the trial court, the admission of prior consistent statements over an objection that the statements were "made *after* the inconsistent statements were made and the motive of [the witness] to fabricate was greatest—to shift responsibility for the crime to others after reflection." *Id.* at 104.. The court explained that, when such a charge of fabrication is made, "all of the incidents and factors that shed light upon his credibility, both pro and con, are admitted, subject to the Court's discretion, and left to the jury for its evaluation and determination. * * * [O]nly by a full exposure of the relevant and pertinent facts in this difficult situation can the jury make an

intelligent and reasonable attempt to ascertain the truth." *Id.* at 105.[22]

Thus, by the time Congress adopted the Federal Rules of Evidence in 1974, the law with respect to the admissibility of prior consistent statements was undergoing considerable liberalization, and the strict common law rule excluding statements made after an alleged motive to lie arose was being replaced by a "flexible approach in determining the admissibility of prior consistent statements for rehabilitation." 3 J. Weinstein & M. Berger, *supra*, ¶ 607[08], at 607-118. This flexible approach was "consistent with the [subsequent] recognition by the Federal Rules of Evidence that relevancy turns on the particular circumstances of each case," *id.* at 607-120, but it is inconsistent with petitioner's blanket rule that would exclude much potentially relevant evidence.

3. The legislative history of the Federal Rules of Evidence and the advisory committee's notes shed little light on the specific question presented in this case. It is clear, however, that, as a general matter, Rule 801 repudiated the common law's hostility to prior statements of a witness. The logic behind Rule 801(d)(1) is that prior statements of a witness present little hearsay danger because the witness may be questioned about them on cross-examination. Rule 801(d)(1) thus departed from the "orthodox position" that all prior statements of a witness were hearsay.

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[22] See also *United States* v. *Gandy*, 469 F.2d 1134 (5th Cir. 1972); *United States* v. *Zito*, 467 F.2d 1401, 1403-1404 (2d Cir. 1972); *Copes* v. *United States*, 345 F.2d 723, 726 & n.8 (D.C. Cir. 1964).

See 4 J. Weinstein & M. Berger, *supra*, ¶801(d)(1)[01], at 801-128.[23]

Rule 801(d)(1)(B) also discarded an archaic provision of the common law, which required trial courts to instruct jurors that prior consistent statements could not be used as substantive evidence but could only be considered for the purpose of rehabilitation of a witness's character after cross-examination. See Fed. R. Evid. 801(d)(1)(B) advisory committee's note. While this particular broadening of the use of prior

[23] Rule 801(d)(1)(B) does not admit all prior consistent statements of a witness, but only those offered to rebut a charge of recent fabrication or improper influence or motive. The Federal Rules therefore do not go so far as the ALI Model Code of Evidence or the Uniform Rules of Evidence proposed, nor so far as many academic commentators would have gone. While the legislative history and the advisory committee's notes do not explain why the drafters of the Rule were unwilling to adopt a broader rule, the limitation appears to rest on the idea that the rule against hearsay is a version of the "Best Evidence" rule. When the witness testifies to a matter and is not impeached, there is no need to introduce any prior statement reciting the same statement; the better evidence is the live testimony, and the prior statement is purely cumulative. When the witness is impeached, however, his testimony can be corroborated through the introduction of a prior consistent statement.

It is also true that Rule 801(d)(1)(A) limits the admissibility of prior *inconsistent* statements to those given under oath. This limitation, however, was not part of the Rule as drafted by the advisory committee or transmitted by this Court, but was added by Congress, and the advisory committee strongly opposed the amendment. Congress added this restriction because of concerns that a criminal defendant could be convicted solely on the basis of an unsworn out-of-court statement. See generally 4 J. Weinstein & M. Berger, *supra*, at 801-13 to 801-36.

consistent statements does not bear directly on the issue in this case, it does further rebut petitioner's contention that the drafters of Rule 801 adhered to traditional common law conceptions of hearsay evidence in this context.[24]

In sum, given the substantial criticism of the common law rule in the generation before the adoption of the Federal Rules of Evidence, the weakening of that rule in the courts, and the Rules' repudiation of the common law's hostile stance against prior consistent statements, there is no persuasive reason to conclude that Rule 801(d)(1)(B) incorporated, by implication, the common law pre-motive rule.

[24] This case does not require the Court to decide whether a pre-motive rule also applies to prior consistent statements that are not admitted as substantive evidence, but are used merely to rehabilitate a witness after impeachment through a prior inconsistent statement. Every circuit that has adopted petitioner's pre-motive rule has held that it does not apply when the statement is not admitted as substantive evidence. See *United States* v. *Brennan*, 798 F.2d 581, 587-589 (2d Cir. 1986); *United States* v. *Bowman*, 798 F.2d 333, 338 (8th Cir. 1986); *United States* v. *Harris*, 761 F.2d 394, 400 (7th Cir. 1985); *United States* v. *Parodi*, 703 F.2d 768, 784-785 (4th Cir. 1983). See also *United States* v. *Rubin*, 609 F.2d 51, 66-70 (2d Cir. 1979) (Friendly, J., concurring), aff'd, 449 U.S. 424 (1981). The reasoning is that impeachment of witnesses is not addressed in Article VIII of the Federal Rules of Evidence but in Article VI, and, in particular, that impeachment of witnesses by prior inconsistent statements is not limited by Rule 801(d)(1)(A). See *United States* v. *Marchand*, 564 F.2d 983, 999 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); *United States* v. *Porter*, 544 F.2d 936, 938 n.2 (8th Cir. 1976). Since Rule 801(d)(1) places no limits on impeachment of witnesses by their prior statements, it arguably places no limits on their rehabilitation by the same method.

II. THE DISTRICT COURT PROPERLY ADMITTED A.T.'S PRIOR CONSISTENT STATEMENTS

The district court properly admitted A.T.'s prior consistent statements because the circumstances in which the out-of-court statements were made suggested that they were not the product of the alleged discrediting motive. The out-of-court statements therefore tended to show that A.T.'s testimony on the stand was also not the product of an improper influence or motive.

As the court of appeals observed (J.A. 36), the alleged motive to fabricate in this case was unlikely to have influenced A.T.'s out-of-court statements. It is doubtful that a five-year-old child would have had the sophistication necessary to formulate and implement a deceptive scheme necessary to ensure her return to her mother's custody. As the court of appeals correctly noted, there was no evidence "that the five-year old A.T. possessed the ability to appreciate the causal relationships inherent in the conception and implementation of such a scheme." *Ibid.* A five-year-old child who wished to remain with her mother because she had more friends where her mother lived and because she missed her mother when she was with her father would likely have said so, instead of concocting an elaborate tale about sexual abuse. By far the most likely motivation for A.T.'s statements about sexual abuse, therefore, is that they were true.

Even if some credence is lent to the possibility that A.T. might have invented her story on the witness stand because she wanted to stay with her mother, the circumstances in which A.T. made her out-of-court statements strongly suggest that they were

not fabrications of that kind. Kae Ecklebarger (the Child Protection Services caseworker) and the three pediatricians were all strangers to A.T., and there was no reason for A.T. to believe that they had any influence on the issue of custody. Although A.T. knew she was there "because of what [petitioner] had done to her," V Tr. 317, A.T.'s statement to Ecklebarger was made in the context of an investigation into the abuse, not the custody determination.

In addition, Ecklebarger's interview of A.T. took place outside the presence of her mother, and Ecklebarger was careful not to ask A.T. any leading questions. V Tr. 315-316. A.T.'s detailed statement to Ecklebarger and her demonstration of the abuse on the caseworker's anatomically correct dolls also indicate that A.T.'s statement to Ecklebarger was not merely a repetition of what she had told her baby-sitter. Dr. Kuper watched for coaching from A.T.'s mother when she asked A.T. questions, and she did not bring up the subject of A.T.'s fear of returning to her father, V Tr. 281-283, which might have influenced A.T.'s statement to her. Dr. Reich was not even aware that A.T. was involved in a custody dispute. V Tr. 302. Because the circumstances under which all of these statements were made indicate that they were not colored by A.T.'s wish to stay with her mother, they were clearly admissible to rebut a charge of improper motive.

Likewise, the district court did not abuse its discretion in admitting into evidence A.T.'s statements to Rocha, her baby-sitter. The circumstances under which they were made also tended to show that A.T. was not fabricating the statements out of a wish to stay with her mother. A.T.'s first allegation to Rocha was spontaneous. A.T. refused at first to give Rocha

any explanation of this statement, which is behavior inconsistent with the suggestion that A.T. was deliberately making up the statement to prevent her return to her father. A.T. also straightforwardly told Rocha that she did not want to go back to her father, which is inconsistent with the charge that A.T. was concocting an elaborate story because of an underlying, concealed motive to stay with her mother. The rest of A.T.'s statements to Rocha were detailed and unprompted by leading questions, indicating they were free of any improper influence or suggestion on the part of her mother or Rocha.

A.T.'s refusal to tell her mother about the abuse is an especially persuasive factor indicating that her statements to Rocha were not fabricated. If A.T. in fact had made up her allegations of abuse because she wanted to stay with her mother, she most likely would have gone directly to her mother with the story. But, according to both her mother and Rocha, A.T. would not tell her mother what she meant by her spontaneous comment to Rocha, and A.T. started crying when her mother pressed her for an explanation. J.A. 19; V Tr. 199, 222; VI-A Tr. 406-407. Rocha had to go over to A.T.'s mother's house to get the rest of the story from A.T, and A.T. still would not explain her story until her mother left the room. VI-A Tr. 407. Only when her mother was out of the room did A.T. tell Rocha how petitioner took off her clothes, uncrossed her legs, and sexually assaulted her. J.A. 12.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MATTHEW WAYNE TOME,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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INTRODUCTION

Petitioner's opening brief demonstrated that the plain meaning, common law antecedents, and legislative history of Fed. R. Evid. 801(d)(1)(B) show conclusively that the Rule incorporates the common law "prior-in-time" or "pre-motive rule." That rule states that where a charge of recent fabrication or improper motive is made, proof of a prior consistent statement is admissible only where such statement was made prior to the factual circumstances giving rise to the charged improper motive and thereby, by the very fact of its making, serves to *rebut* the charge.

The government *admits* that the pre-motive rule was the "*majority rule*" at the time of adoption of the Federal Rules. Resp. Br. 15, 33 (emphasis added). In fact, the pre-motive rule was the "universal rule." M.C. Dransfield, Annotation, *Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony*, 75 A.L.R.2d 909, 920 (1961). Moreover, the very terms used in Rule 801(d)(1)(B)—"rebut" and "recent fabrication"—are terms of art drawn from the common law pre-motive rule. *See, e.g., id.* (where witness is "*charged* with . . . influence of [improper] *motive* . . . declarations at a time when motive did not exist . . . show that the testimony was not an afterthought and *rebut* the theory of *fabrication*") (emphasis added); Resp. Br. 27 ("charge of recent fabrication" is charge that witness "made it all up" for purposes of trial and is rebutted by showing that "at an earlier time" witness told same story).

Despite the common law antecedents of the Rule's terms and principles, the government contends that Congress intended the Rule to take a new direction—to permit admission of any prior consistent statement having relevance to "witnesses' credibility." Resp. Br. 19. The government's interpretation is fundamentally flawed. Rule 801(d)(1)(B) speaks in terms of rebuttal evidence, not relevance. Moreover, there is no indication in the Advisory Committee notes or legislative history that Rule 801(d)(1)(B) was intended to depart from the common law

and embody the new direction espoused by the government. "Absent contrary indications, we can presume that Congress intended the principles and terms used in the Federal Rules of Evidence to be applied as they were at common law." *Williamson* v. *United States*, 62 U.S.L.W. 4639, 4645 (U.S., June 27, 1994) (Kennedy, J., concurring, joined by Rehnquist, C.J., Thomas, J.); *see United States* v. *Abel*, 469 U.S. 45, 52 (1984) (holding that the body of common law knowledge continues to exist as a source of guidance). In fact, the legislative history *undermines* the government's interpretation. The Advisory Committee and Congress intended to enact a "system of class exceptions" drawn from the common law and *rejected* the view that "[a]dmissibility would be determined by weighing the probative force of the evidence . . . ." Advisory Committee Note to Article VIII, Introductory Note: The Hearsay Problem, 28 U.S.C. App., at 771. In sum, the legislative history as well as the plain meaning, common law terms of art, and common law antecedents of Rule 801(d)(1)(B) support petitioner's and not the government's reading of the Rule.

ARGUMENT

I. THE PLAIN MEANING, TERMS OF ART, COMMON LAW ANTECEDENTS, AND LEGISLATIVE HISTORY OF RULE 801(d)(1)(B) SHOW CONCLUSIVELY THAT THE RULE INCORPORATES THE COMMON LAW "PRIOR IN TIME" OR "PRE-MOTIVE" RULE.

A. The Government's Interpretation Is Contrary To The Plain Meaning Of The Rule's Terms And Also To The Established Meaning Those Terms Enjoyed In Common Law.

1. The government seeks to avoid the plain meaning of the words "offered to rebut an express or implied charge against the declarant of recent fabrication . . . ." Fed. R. Evid. 801(d)(1)(B). The government's first position is that the phrase "offered to rebut" is essentially meaningless and provides no direction as to any preliminary finding a trial judge must make concerning the relationship between the prior consistent statement and the charge of improper motive: "the Rule requires only that the statement be '*offered* to rebut' the charge, not that the statement, in fact, 'rebut' the charge." Resp. Br. 18. A party's claim that a statement is "offered to rebut" is false if the statement has no probative value to rebut; the statement then is actually offered for some other purpose, such as to bolster the witness's credibility. The more natural reading of "offered to rebut" is that a judge preliminarily find that, if believed by the jury, the witness's claim that declarant actually made the prior statement would rebut the charge of improper motive.

The government then retreats to its basic argument that Rule 801(d)(1)(B) "gives the parties leeway to introduce evidence that *tends to rebut* a charge of fabrication." *Id.* (emphasis added). The government's view is that prior consistent statements may be admitted if, "in light of all the evidence," they bear on an *ultimate* determination of the "witnesses' credibility." Resp. Br. 18-19.

The Rule's text does not support the government's interpretation; it says "rebut," not "tends to rebut," [1] and refers to statements rebutting the "charge" of improper motive, rather than to statements relevant to an ultimate determination of declarant's credibility. The government's interpretation would transform the Rule to read: "Upon a charge of recent fabrication or improper influence or mo-

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[1] Indeed, the government's interpretation of "rebut" is at odds with common definitions of the term. The government *admits*, Resp. Br. 22, that "rebut" is defined thusly: "to contradict, meet, or oppose by formal legal argument, plea or countervailing proof," "to expose the falsity of," and "to make or put in an answer or counter proof." *Id.* quoting *Webster's Third New International Dictionary* 1893 (1986). Introduction of a prior consistent statement subject to the same improper motive charged, as occurred in this case, which statement may, in conjunction with all other evidence in the case, make the fact finder view the witness's truthfulness as more likely, does not "contradict" or even "meet" the charge of improper motive; it does not "oppose by formal legal argument, plea or countervailing proof," or "expose the falsity of" the charge of improper motive.

tive, all prior consistent statements of declarant relevant to declarant's credibility are admissible nonhearsay."[2]

The government also peppers its argument concerning the meaning of "rebut" with completely baseless claims that petitioner's position would require a judge to "encroach on the jury's domain of evaluating the credibility of witnesses," Resp. Br. 19, and to "decide whether each statement, by itself, would completely defeat the charge of improper motive . . . ." Resp. Br. 22; *see also* Resp. Br. 28. In fact, the common law rule requires only that the judge determine whether the prior consistent statement preceded or post-dated the period when the charged improper motive existed. The judge thereby admits only testimony about those hearsay statements that, if believed by the jury, would rebut the charge of improper motive. By contrast, it is the government's and Tenth Circuit's rule which requires the judge to determine the "probative weight" of the prior consistent statement with respect to declarant's credibility at the time of making the statement. *See* J.A. 36-37 (analyzing trustworthiness of A.T.'s prior consistent statements).

2. The government offers no adequate explanation for the temporal reference in the Rule to charges of "*recent* fabrication or improper influence or motive." The government admits that "a charge of recent fabrication involves an allegation that 'the witness has made it all up' to meet the exingencies of the case." Resp. Br. 27, quoting 4 D. Louisell & C. Mueller, *Federal Evidence* § 420, at 188 (1980). Further, the government acknowledges that "[i]n response to a charge of recent fabrication, the *purpose* of the prior consistent statement is to show that,

[2] The Solicitor General states that this Court's own "practice" with respect to "rebuttal argument" indicates that rebuttal evidence need not meet or contradict the charge against which it is offered. Resp. Br. 22. But clearly, the purpose of rebuttal argument is to make points which, if accepted by this Court, would rebut respondent's arguments and result in petitioner's prevailing on the merits. It would waste the Court's time for a petitioner to use rebuttal to make arguments that, even if accepted by the Court, would not rebut respondent's claims.

at an earlier time, 'the witness did speak and tell the same story.'" Resp. Br. 27 (emphasis added), quoting 4 J. Wigmore, *Evidence*, § 1129, at 271 (Chadbourn rev. ed. 1972). The government therefore concedes that a charge of recent fabrication is rebutted by introducing a prior consistent statement from "an earlier time," that is, from a time when the motive to fabricate did not exist. Likewise, charges of improper motive, bias, or influence have been rebutted for more than a century by the introduction of prior consistent statements from "an earlier time" than the more recent motive, bias or influence.

Because charges of improper motive, bias or influence are disproved in the same manner as charges of recent fabrication, *i.e.*, by introduction of prior consistent statements from "an earlier time," they have been analyzed together by commentators and treatises. *See* 4 Louisell & Mueller, *supra*, § 420, at 193 (discussing "charge of fabrication, influence, or motive"); 1 *McCormick on Evidence* § 47, at 177 (4th Ed. J.W. Strong 1992) (similar); Annotation, *supra*, 75 A.L.R.2d at 935-46 (analyzing "Impeachment on ground of bias, interest, recent fabrication, or motive to falsify").[3] Accordingly, a common sense reading of Rule 801(d)(1)(B) is that the terms "recent fabrication or improper influence or motive" are placed together because they are commonly rebutted in the same manner. The temporal element embodied in the word "recent" and the term "recent fabrication," and the manner of disproving a "recent fabrication," apply to charges of influence and motive as well.

3. Finally, any valid analysis of the language of Rule 801(d)(1)(B) must account for the fact that the Rule employs terms of art, imported wholesale from the common law. *See, e.g., Ellicott* v. *Pearl*, 35 U.S. (10 Pet.) 412, 439 (1836) ("where testimony is assailed as a

[3] *See* M. Graham, *Federal Practice & Procedure* § 6512, at 463-64 (1992) ("[A] charge of improper motive capable of being rebutted by introduction of a prior consistent statement must also be a charge of recent fabrication . . ."). A charge of improper motive implies that the motive caused the witness to distort or alter his or her testimony.

fabrication of *recent* date . . . in order to *repel* such imputation, proof of the antecedent declaration of the party may be admitted"); Resp. Br. 27 (discussing meaning of "recent fabrication"). The term "rebut" is itself, in this context, a common law term of art meaning to disprove by proof of a pre-motive consistent statement.[4] The plain language of Rule 801(d)(1)(B) illustrates the great extent to which "Congress legislated against the common law background" in enacting this Rule. *Williamson*, 62 U.S.L.W. at 4645 (Kennedy, J., concurring, joined by Rehnquist, C.J., Thomas, J.). The government fails to adequately explain why such language should be given a different meaning than it had at common law.

B. The Government Relies On Inapposite Case Law Pertaining To The Admission Of Prior Inconsistent Statements, Rather Than To The Rebuttal Of Charges Of Fabrication, Motive, Or Bias, In A Misguided Attempt To Cloud The Clarity And Near Universal Acceptance Of The Pre-Motive Rule.

Struggling to avoid the inevitable conclusion that Congress, by adopting in Rule 801(d)(1)(B) the precise wording of the majority common law rule, intended to

[4] *See, e.g.*, M.C. Dransfield, Annotation, *Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony*, 140 A.L.R. 21, 185 (1942) (where witness is attacked tending to show "that testimony is a fabrication of recent date, or is colored, distorted, and falsified through the influence of some strong personal motive . . . witness may be corroborated by *rebutting evidence* of his statements consonant in substance with his testimony, made on occasions . . . anterior to the existence of the compromising bias alleged to impair his credibility") (emphasis added); Annotation, *supra*, 75 A.L.R.2d at 920 (where witness is "charged with . . . influence of [improper] motive . . . declarations at a time when motive did not exist . . . show that the testimony was not an afterthought and *rebut* the theory of fabrication") (emphasis added); *People* v. *Clark*, 288 N.E.2d 363, 371 (Ill. 1972) ("to *rebut* a *charge* or an *inference* that the witness is motivated to testify falsely or that his testimony is of *recent fabrication*, evidence is admissible that he told the same story before the motive came into existence or before the time of the alleged fabrication") (emphasis added).

adopt the pre-motive principle, the government asserts that (1) the "common law rule was never so absolute as petitioner suggests . . . many courts viewed the question of prior consistent statements as one of relevancy," Resp. Br. 33, and (2) some commentators and courts had criticized the common law rule prior to adoption of the Federal Rules of Evidence. *Id.* These arguments are without merit.

1. When the Federal Rules were adopted in 1975, the pre-motive rule had been expressly adopted by an overwhelming majority of state and federal courts.[5] Moreover, the rule frequently used virtually the identical words adopted by Congress in Rule 801(d)(1)(B).[6] As the government admits, the pre-motive rule had been the established common law rule *for over a century* at the time of adoption of the Federal Rules.[7]

In light of the above, to support its claims that the common law rule "was never so absolute as petitioner suggests" and "many courts viewed the question of prior consistent statements as one of relevancy," Resp. Br. 33, the government relies on an inapposite line of cases concerning the admission of prior consistent statements to counter the admission of prior *inconsistent* statements, *not* to rebut a charge of recent fabrication or improper motive. Considerable disagreement existed at common law about the former, but not about the latter. *See* E.

[5] *See, e.g.*, Annotation, *supra*, 75 A.L.R.2d at 920 (concluding that pre-motive rule is the "universal rule"); *id.* at 937-940 (listing states); Annotation, *supra*, 140 A.L.R. at 80-85, 93-99 (listing cases).

[6] *See, e.g.*, *Ellicott*, 35 U.S. at 439; *Lyon* v. *Oliver*, 147 N.E. 251, 255 (Ill. 1925) ("[a]s a general rule, proof of statements made by a witness out of court harmonizing with his theory is inadmissible, but where it is *charged* that his story is a *recent fabrication*, or that he had some *motive* for testifying falsely, *proof* that he gave a similar account of the transaction when the motive did not exist or before the effect of the account could be foreseen is admissible").

[7] Resp. Br. 39 ("petitioner is correct that the majority rule, as developed in the latter half of the nineteenth century" was the pre-motive rule).

Thomas, *Rehabilitating the Impeached Witness With Consistent Statements*, 32 Mo. L. Rev. 472, 482 (1968) ("some of the rules in the inconsistent statements area have been both unsettled and subject to criticism while the bias and recent fabrication rules have been generally accepted in most jurisdictions"); 4 Wigmore, *supra*, § 1126, at 258 ("[t]he field in which judicial divergence of views is most vigorous and the opposing reason most plausible is that of impeachment by prior inconsistent statements"). Compare 1 *McCormick on Evidence, supra*, § 47, at 177 ("if the attacker has charged bias . . . the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless . . . made *before* the source of the bias") with *id.* at 178 ("[t]here is much division of opinion on the question whether impeachment by inconsistent statements opens the door to support by proving consistent statements").

Impeachment by inconsistent statement may or may not be accompanied by a charge of contrivance or improper influence or motive. If there has been no such charge, the timing of the consistent statement may be insignificant. For example, after impeachment by an inconsistent statement, a prior consistent statement should be admissible to support a declarant's *denial* or *explanation* of the inconsistent statement regardless of whether the consistent statement was made before or after the inconsistent statement. *See* M. Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 Hastings L.J. 575, 604 (1979) (hereinafter Graham); 1 *McCormick on Evidence, supra*, § 47, at 178 ("If the attacked witness *denies* the making of the inconsistent statement then some courts consider that the evidence of consistent statements near the time of the alleged *inconsistent* one, is relevant to fortify his denial") (emphasis added).

The government relies on analysis concerning prior inconsistent statements in three cases [8] to suggest that the

[8] *See* Resp. Br. 33-39, discussing *Ellicott* v. *Pearl*, 35 U.S. (10 Pet.) 412 (1836); *Conrad* v. *Griffey*, 52 U.S. (11 How.) 480 (1850); *Stewart* v. *People*, 23 Mich. 63 (1871).

common law rule applicable to charges of recent fabrication or improper motive has been in flux and incorporates tests of "relevancy" or "weight and credibility." Resp. Br. 33, 39. These cases do not support this theory, and one flatly contradicts it.

In *Ellicott*, 35 U.S. at 438, the deposition testimony of one Kincaid was impeached through admission of prior inconsistent statements. This Court upheld the lower court's exclusion of proffered testimony of other witnesses of prior statements by Kincaid consistent with his deposition. While the holding in *Ellicott* may suggest that the common law on admission of prior consistent statements to *explain* prior *inconsistent statements* was in a state of transition and may have involved considerations regarding the "weight" of the evidence, that holding does not apply to the common law rule regarding recent fabrication. On the contrary, the Court in *Ellicott* indicated that its reasoning with respect to prior consistent statements offered to counter inconsistent statements was not applicable "where the testimony is assailed as a fabrication of a recent date, or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted." *Id.* at 439. *Ellicott* thus reveals that as early as 1836, the common law rule with respect to charges of recent fabrication was established, and contained the "prior in time" or "pre-motive" rule. Moreover, the very terms used by the Court—"fabrication of recent date" and "in order to repel such imputation"—are similar to the terms "recent fabrication" and "offered to rebut" in Rule 801(d)(1)(B).

Similarly, the issue in *Conrad* v. *Griffey*, 52 U.S. (11 How.) 480 (1850), was whether an unsworn statement and an affidavit of an engineer, stating that he had constructed a mill properly, should be admissible to counter prior inconsistent statements, made by the engineer shortly after an accident at the mill, that had been admitted to impeach the engineer's testimony given in the form of interrogatories. This Court held that the state-

ment and affidavit should be excluded because they arose subsequent to the prior inconsistent statements, may have been made "for the very purpose of counteracting" those inconsistent statements, and thus lacked "force and credibility." *Id.* at 492. *Conrad*'s holding involved admissibility of prior consistent statements to explain prior inconsistent statements, not to rebut a charge of fabrication or improper motive.

In *Stewart* v. *People*, 23 Mich. 63 (1871), the court correctly concluded that a prior consistent statement was properly admitted to support the declarant's *denial* of making the inconsistent statement attributed to him. The court found that the pattern of consistency tended to show that the witness never made the inconsistent statement. *Id.* at 75-76. The *Stewart* case does not aid the government; the timing of the prior consistent statement in that case was not even discussed.[9]

In sum, the government's reliance on analysis pertaining to the admissibility of prior consistent statements to counter the admission of prior inconsistent statements sheds no light on the separate common law rule respecting charges of recent fabrication or improper motive. The contours of the latter rule were firmly established for at least a century before adoption of Rule 801 (d)(1)(B). They encompassed a preliminary factual finding that the prior consistent statement arose prior to the facts relied upon to show improper motive; they did not include credibility, weight or relevancy determinations, which would arise only *after* the prior consistent statement satisfied the common law pre-motive rule.

[9] A prior consistent statement in a case such as *Stewart* would be admissible under Fed. R. Evid. 613(b), which provides, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same . . ." *See* M. Graham, *Federal Practice and Procedure, supra*, § 6712, at 461: "A prior statement that corroborates the witness may be admitted without reference to Rule 801(d)(1)(B), if it . . . is otherwise related to or supportive of a denial or explanation offered in response to impeachment of a witness by an alleged self-contradiction, whether an inconsistent statement or a failure to speak when natural to do so, Rule 613."

2. In an equally unavailing effort to obscure the clarity of the common law rule, the government and amici note that beginning in the 1940's, some commentators criticized the common law's general hostility to and exclusion of both prior consistent and prior inconsistent statements of witnesses. Such commentators argued that *all* prior statements of witnesses should be admissible, as the declarant was available and could be cross-examined regarding the out-of-court statements. Resp. Br. 40-41; States' ("St.") Amicus Br. 11. Model codes of evidence reflecting this view were also propounded. *See* Resp. Br. 40 n.21.

What both the government and amici neglect to mention is that the Advisory Committee expressly considered and rejected the view of these commentators and model codes, opting instead for "a system of class exceptions" drawn from the common law. Advisory Committee Note to Article VIII, *supra*, 28 U.S.C. App., at 770-71 (rejecting Uniform Rule 63(1)'s approach of "admitting the hearsay declaration of a person 'who is present at the hearing and available for cross-examination,'" and rejecting the views of commentators, including expressly those of the Honorable Judge Weinstein, that "[a]dmissibility would be determined by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence").[10] The Advisory Committee could not have been more explicit in rejecting the commentators' views on which the government relies.[11] The Committee

[10] The government's amici claim that the Advisory Committee Note to Rule 801(d)(1)(B) discusses how a prior statement is "nearer in time" and therefore more likely to be true. Amicus Br. 8. The quoted language, however, comes from the Advisory Committee Note, 28 U.S.C. App., at 773, pertaining to admission of prior *inconsistent* statements under Rule 801(d)(1)(A).

[11] With reference to Rule 801(d)(1), the drafters noted the views of commentators but observed:

> The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as sub-

evinced its reliance on the common law "system of class exceptions" in crafting Rule 801(d)(1)(B), referring specifically to Rule 801(d)(1)(B) as enumerating one of "three situations" in which a prior consistent statement "is excepted from the category of hearsay." Advisory Committee Note, 28 U.S.C. App., at 773.[12] Finally, the drafters made it plain that Rule 801(d)(1)(B) embodies the traditional common law rule by explaining the rule thusly: "Prior consistent statements *traditionally* have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence." *Id.* (emphasis added).

The principle on which the government rests much of its argument, *i.e.*, that the presence of a declarant as a witness is sufficient to guard against abuse, was rejected in fashioning Rule (801)(d)(1). Judge Weinstein states that the Advisory Committee, in its first unpublished draft of Rule 801, took the position of the Uniform and Model rules "that the trier of fact would have an adequate basis

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> stantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.
>
> The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence.

Advisory Committee Notes, 28 U.S.C. App., at 773.

[12] The government hypothesizes that the drafters of Rule 801(d)(1)(B) were crafting a "version of the 'Best Evidence' rule." Resp. Br. 44 n.23. However, the drafters expressly rejected a theory of hearsay where "admissibility would be determined by weighing the probative force of the evidence against . . . the availability of more satisfactory evidence," Advisory Committee Note to Article VIII, *supra*, 28 U.S.C. App., at 771, and instead stated that Rule 801(d)(1)(B) was based on a "judgment [that] is one more of experience than of logic." Advisory Committee Note, 28 U.S.C. App., at 773. Moreover, the government's hypothesis, were it true, fails to undermine the pre-motive rule. A prior consistent statement is not "better evidence" than the in-court testimony of a declarant unless, of course, the prior consistent statement was made *before* the facts relied upon to show improper motive.

for testing the credibility of a declarant who also appears as a witness." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 801(d)(1)[01], at 801-132 (1993). "However, this original formulation led to objections by attorneys who feared that the rule would be abused, and the final version of Rule 801, as promulgated by the Supreme Court, limited the situations in which prior statements of a witness would be given substantive effect to the three categories now set forth in subparagraphs (A), (B) and (C) of Rule 801(d)(1)." *Id.* It is therefore incongruous to suppose, as the government argues, that the Advisory Committee, this Court, and Congress intended an express or implied charge of recent fabrication or improper motive to open the floodgates to the admission by the opposing side of any and all of declarants' prior consistent statements, whether or not made prior to the facts alleged in support of such charged improper motive.[13] Contrary to the government's contentions, Resp. Br. 31, an opportunity to cross-examine the declarant does not offset the dangers that statements will be manufactured or that cases will be decided largely on evidence less reliable than the declarant's in-court testimony."[14] That danger is particularly severe in a case, such as the one

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[13] *Cf.* 4 D. Louisell & C. Mueller, *supra*, § 240, at 187 (1980) ("Rule 801(d)(1)(B) does not authorize the general use of any and all prior statements . . . and the underlying reason seems to be mainly a fear that unlimited substantive use of prior statements would encourage (even press) lawyers to collect and later to offer such statements, leading in turn to decisions based upon evidence less reliable than live testimony").

[14] In this case, for example, A.T. was allegedly abused about June 1989. Her first statement about the abuse was alleged to have been made in August 1990. Petitioner's trial took place in February and March, 1992. On cross-examination, A.T. either denied or testified that she did not remember her prior statements. *See* Pet. Br. 5; Tr. 145, 152-53. Even under the best of circumstances, cross-examination of a witness concerning her motivation for making statements eighteen months before trial about events that allegedly occurred yet another fourteen months earlier posed a herculean task.

at bar, involving weak testimony by the declarant followed by numerous prior consistent statements which form the heart of the prosecution's case.[15]

The established common law rule, in the shadow of which Congress legislated, was that even where the declarant was a witness, testimony as to the declarant's out-of-court consistent statements could not be admitted to corroborate the declarant's testimony.[16] Had Congress or the Advisory Committee intended that this rule be discarded upon an express or implied charge of improper motive, and that any prior consistent statements relative to corroborating the witness's testimony be introduced, they would have so stated.[17] The conclusion that Rule 801(d)(1)(B) incorporates the "prior-in-time" or pre-motive common law rule is further supported by most

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[15] No sound argument for harmless error can be advanced in this case. Individually and cumulatively, the erroneous admission of the seven prior statements was extremely prejudicial. Moreover, the district court relied solely on Rule 801(d)(1)(B) in admitting A.T.'s August 27, 1990, statement to Rocha, to which Padilla also testified, rejecting the government's contention that Rocha's testimony was also admissible under Fed. R. Evid. 803(24). Rocha's testimony about that statement was highly inculpatory and greatly exceeded the scope of A.T.'s testimony.

[16] *See, e.g., People* v. *Clark*, *supra*, 288 N.E.2d at 371 ("witness may not testify as to statements he gave out of court for the purpose of corroborating his testimony given at the trial").

[17] The government wrongly claims that Rule 801(d)(1)(B)'s expanded *use* of prior consistent statements demonstrates that the drafters intended to reject "traditional common law conceptions of hearsay evidence." Resp. Br. 44-45. Where the traditional standard was being altered, the framers said so; both the language of the Rule ("A statement is not hearsay if . . .") and the accompanying Advisory Committee Note, 28 U.S.C. App., at 773, specifically recognize that substantive use of prior consistent statements was disallowed at common law. There is no credible reason to assume from a single express change to the traditional use of prior consistent statements that Rule 801(d)(1)(B) constitutes a *sub silencio* rejection of the common law standard of *admissibility* of prior consistent statements.

commentators, including Professor Cleary, the Reporter for the Advisory Committee.[18]

3. There is also little merit to the government's argument that in the "decade preceding the adoption of the Federal Rules of Evidence," the clarity of the common law pre-motive rule was muddied as federal courts of appeal became influenced by commentators. Resp. Br. 41-43. The government cites five cases in support of this claim. Two concern the admissibility of prior consistent statements to *explain* prior *inconsistent* statements and, hence, are inapposite.[19] Two cases are consistent with the pre-motive rule.[20] One of these, *United States* v. *Zito*,

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[18] *See e.g.*, E. Cleary, *McCormick on Evidence* § 251, at 747 (3d ed. 1984) (summarizing the intended application of Rule 801(d)(1)(B)); 1 *McCormick on Evidence*, *supra*, § 47, at 177 ("prior consistent statement has no relevancy to refute the charge unless . . . made *before* the source of the bias . . . . The above results should ordinarily be reached under the Federal Rules of Evidence") (citations omitted); 4 D. Louisell & C. Mueller, *supra*, § 420, at 187 (under the Rule, prior statement "must specifically tend to rebut a charge . . . of 'recent fabrication or improper influence or motive'"); *id.* at 193 ("by traditional learning . . . statements [are] relevant only if they were uttered before such corrupting forces came into play. Theoretically, this idea is sound, and most modern authority applying Rule 801(d)(1)(B) agrees") (citations omitted); *but see* 4 J. Weinstein & M. Berger, *supra*, § 801(d)(1)(B)[01], art 801-196 (stating that "[a]lthough the Advisory Committee's note does not specifically address this issue, a number of circuits have read into Rule 801(d)(1)(B) a requirement that the prior consistent statement must have been made before the declarant had a motive to fabricate his story").

[19] In *Hanger* v. *United States*, 398 F.2d 91 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969), the Eighth Circuit held that in the context of responding to prior *inconsistent* statements, there should not be a rule "that prior consistent statements must have been made prior to the impeaching statements . . . ." *Id.* at 104. But the court recognized that when "testimony is assailed as a fabrication," the pre-motive rule applies. *Id.* at 103. Similarly, in *Copes* v. *United States*, 345 F.2d 723 (D.C. Cir. 1964), the court held that a prior consistent statement need not precede a prior inconsistent statement to be admissible.

[20] *See United States* v. *Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972) (holding admissible statements made prior to events allegedly

even cites Proposed Federal Rules of Evidence, Rule 801(d)(1)(B) (submitted to the Supreme Court in November 1971) as embodying "the *usual rule* that prior consistent statements can only be introduced after a charge that a witness's story is a recent fabrication and where the statements were made *before* any motive to fabricate developed." 467 F.2d at 1403-1404 (emphasis added). The final case does adopt the probative-weight analysis favored by the government in the fabrication context,[21] but this case comes from the Fifth Circuit, one of the few, if not the only, federal circuits clearly to depart from the majority common law rule prior to adoption of the Federal Rules.[22] *See* 4 J. Weinstein & M. Berger, *supra*, § 801(d)(1)(B), at 801-196 n.13, 801-198 n.14.[23]

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supporting charge of fabrication); *United States* v. *Bays*, 448 F.2d 977 (5th Cir. 1971), *cert. denied*, 405 U.S. 957 (1972) (holding admissible statement made *after* arrest but *before* conviction). The holding in *Bays* is consistent with courts that adopt the pre-motive rule and hold that where multiple motives are asserted, "a prior consistent statement is admissible if it was made before the existence of any one or more of the biases or motives that, according to the opposing party's express or implied charge, may have influenced the witnesses' testimony." *People* v. *Hays*, 802 P.2d 376, 395 (Cal. 1990), *cert. denied*, 112 S.Ct. 420 (1991).

[21] *See United States* v. *Gandy*, 469 F.2d 1134 (5th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973).

[22] The substantive effect afforded prior consistent statements under Rule 801(d)(1)(B) makes it particularly important that trial judges exercise caution in limiting admission of prior consistent statements to those that rebut a specified charge of impeachment.

[23] The Tenth Circuit, too, relied on a case involving prior inconsistent statements, *not* a charge of improper motive. *See* J.A. 34-36, discussing *United States* v. *Miller*, 874 F.2d 1255 (9th Cir. 1989). Due to confusion surrounding prior inconsistent statements at common law and under Rule 801(d)(1)(B), *Miller* contains misguided reasoning that casts aside three prior Ninth Circuit opinions upholding the pre-motive rule. *Id.* at 1271-74, 1274 n.13, distinguishing *Breneman* v. *Kennecott Corp.*, 799 F.2d 470 (9th Cir. 1986); *United States* v. *Rohrer*, 708 F.2d 429, 433 n.4 (9th Cir. 1983); *United States* v. *Rodriguez*, 452 F.2d 1146, 1148 (9th Cir. 1972). *Cf. Graham* at 592-604 (discussing applicability of Rule 801(d)(1)(B) to prior inconsistent statement cases).

The government relies on 3 J. Weinstein & M. Berger, *supra*, § 607[08], at 607-116, for its claim that in the decade before adoption of the Rules, "several courts eschewed" mechanical application of the pre-motive rule. Resp. Br. 41. The commentators' actual statement, however, is merely that "some courts had *suggested* rejecting a mechanical application of the rule. . . ." *Id.* Even here, Weinstein and Berger fail to specify whether they are discussing the admission of prior consistent statements to explain or deny prior inconsistent statements, or to rebut charges of recent fabrication, or both. *Id.* In fact, a later comment in the same treatise suggests a focus on prior inconsistent statement cases, not fabrication cases.[24] Commentators who have not confused the two lines of cases have concluded that the common law rule where "an impeaching effort . . . does suggest fabrication, influence, or motive" is the pre-motive rule, and that this is also the better interpretation of Rule 801(d)(1)(B) in the fabrication or improper motive context. 4 Louisell & Mueller, *supra*, § 47, at 177; *see also* Annotation, *supra*, 75 A.L.R.2d at 930-46 (discussing "Impeachment by inconsistent statements" separately from "Impeachment on ground of bias, interest, recent fabrication, or motive to falsify"); *id.* at 920 (concluding that pre-motive rule is the "universal rule").

The pre-motive rule has endured because of the power of the insight that a prior consistent statement "has no relevancy to refute the charge [of fabrication] unless the consistent statement was made *before* the source of the bias, interest, influence or incapacity originated." 1 *Mc-*

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[24] *See id.* § 801(d)(1)(B)[01], at 801-200 ("As the discussion in § 607[08], *supra*, indicates, the federal decisions prior to the Rules were rather flexible in admitting prior consistent statements for rehabilitative use. Instead of insisting that the consistent statement have been made prior in time to *the inconsistent statement*, they admitted the consistent statement where under the circumstances of the case it would aid the jury in determining whether the witness was telling the truth") (emphasis added).

Cormick on Evidence, supra, § 47, at 177. The government cannot obscure the clarity and near universal acceptance of the pre-motive rule by referencing inapposite *inconsistent* statement cases. When the Advisory Committee crafted Rule 801(d)(1)(B) to incorporate the rule "traditionally" applicable to the admission of a "prior consistent statement" to "rebut charges of recent fabrication or improper influence or motive," Advisory Committee Note, 28 U.S.C. App., at 773, the traditional rule was the pre-motive rule.

C. The "Probative Weight" Test Collapses The Requirements Of Rule 801(d)(1)(B) Into Relevancy Rules 402 And 403, And Eviscerates The Trustworthiness Requirements Of Rule 803(24) And The Hearsay Rules Generally.

The government's and Tenth Circuit's standard of "probative force apart from mere repetition," J.A. 37, ignores the specific requirements of Rule 801(d)(1)(B) and the intention behind Article VIII to retain the common law "system of class exceptions." Advisory Committee Note to Article VIII, *supra*, 28 U.S.C. App., at 771. Under the government's and Tenth Circuit's standard, the Rule 801(d)(1)(B) rebuttal requirement is reduced to a hollow formality, and admissibility becomes purely a matter of relevancy under Rules 401-403.[25]

Adoption of the "probative weight" theory would eviscerate the effort made in Article VIII, particularly Rule 803, to ensure that only trustworthy out-of-court statements are admitted. Merely upon a finding that *some* indicia of trustworthiness (such as spontaneity) exist, the out-of-court statement is deemed to have "probative force apart from mere repetition," J.A. 37, and comes

[25] For example, the government concludes that a prior consistent statement "that has nothing to do with the charged motive" would be inadmissible not because it fails to meet the rebuttal requirement of Rule 801(d)(1)(B), but only because it would not pass muster under Rule 402. Resp. Br. 18 n.8. Similarly, the government maintains that A.T.'s statements to the prosecutor just before trial would be inadmissible only for lack of relevance under Rule 401. Resp. Br. 30.

in as substantive evidence. This standard is significantly more lax than those embodied in Rule 803, particularly the "catch-all" hearsay exception in Rule 803(24). *See* Pet. Br. 27-28. Indeed, the Tenth Circuit relied on its Rule 801(d)(1)(B) findings to admit the seven prior statements and never reached the thorny issue of whether those statements were admissible under Rule 803(24). J.A. 27.

II. THE POLICY ARGUMENTS OF THE GOVERNMENT AND AMICI CANNOT OVERRIDE THE INTENT OF CONGRESS AND ARE, MOREOVER, UNFOUNDED.

The government and amici lard their briefs with policy arguments that holding that Rule 801(d)(1)(B) embodies the pre-motive rule—the majority common law rule *in use for over a century*—will lead to disaster in particular kinds of cases. First, such arguments are unavailing in the face of Congress's intention to continue the traditional common law rule. Even if such arguments were true, "[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *United States* v. *Salerno*, 112 S.Ct. 2503, 2507 (1992). Furthermore, the fact that the pre-motive rule has been the majority rule for a century reveals the exaggerated quality of such arguments and, indeed, there is no merit to them.

For example, the government worries unnecessarily that courts will exclude prior statements of accomplices whenever a defendant suggests that an accomplice knew from the very early stages of investigation that he might receive a deal. But the mere fact that an accomplice has been arrested does not imbue him with an improper motive. *See United States* v. *Montague*, 958 F.2d 1094, 1100 (D.C. Cir. 1992) (Wald, J., concurring in result and dissenting as to rationale) (holding such statements admissible under the pre-motive rule); E. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B)*, 1987 B.Y.U.L.R. 231 n.69 (same).

The government's amici raise the alarm that the defense will block admission of child victims' prior consistent statements by ascribing to the victims defense-concocted motives to fabricate. St. Amicus Br. 21. The danger is illusory. It is the charge of fabrication that *permits* admission of the statements at all *unless*, of course, the statements are admissible under other Rules (such as Rules 106, 613, 803 and 804) or for the purpose of *explaining* or *denying* inconsistent prior statements, in which case they are admissible regardless of the charge of fabrication. *See United States* v. *Payne*, 944 F.2d 1458, 1471 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1598 (1992) (admitting prior consistent statements drawn from same reports as prior inconsistent statements). Hence, the impact of the pre-motive rule is narrower than the government and amici suggest.

The government complains that if this Court confirms Rule 801(d)(1)(B)'s rebuttal requirement, trial courts will be called upon to make impossible determinations concerning when particular motives arose.[26] Resp. Br. 24-25. In fact, the great majority of federal and state courts have applied the pre-motive rule for over a century without undue difficulty. *See, e.g.*, G. Joseph & S. Saltzburg, *The Federal Rules in the States*, Chapter 56 (Rule 801) at 11 (Michie Co. 1987) (state courts "overwhelmingly impose" the pre-motive rule). In the final analysis, the government and amici simply disagree with Congress's, the Advisory Committee's and this Court's determination to incorporate in Rule 801(d)(1)(B) the traditional common law rule.

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

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[26] In this case, A.T. proclaimed the existence of the charged motive before making her first allegation of abuse ("Please don't let my mom take my [sic] back to my father. . . . Because I don't want to go back." J.A. 11-12.). The government does not dispute that A.T.'s motive to remain with her mother was well-developed at the time of her prior consistent statements.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1993

MATHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

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No. 93-6892

In The

Supreme Court of the United States

October Term, 1993

MATHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

1. INTEREST OF AMICUS CURIAE

This brief is filed on behalf of the National Association of Criminal Defense Lawyers (NACDL). It supports the Petitioner, Mathew Wayne Tome, and advocates reversal. Counsel for Petitioner and the Solicitor General have consented to the filing of this brief.

The NACDL is a District of Columbia non-profit corporation whose membership is comprised of more than 7,000 regular members and 25,000 affiliate members representing lawyers from every state. Members serve in

positions bringing them into daily contact with the criminal justice system in state and federal courts, and regularly represent defendants in federal criminal trials and appeals.

The NACDL is the only national bar organization working exclusively on behalf of public and private criminal defense lawyers and their clients, and is dedicated to the preservation and improvement of our adversary system of justice. The *Amicus Curiae* Committee of the NACDL has discussed this case and decided that the evidentiary issue presented is of such importance to the development of the law that the NACDL would like to offer its assistance to the Court.

2. SUMMARY OF THE ARGUMENT

Under Evidence Rule 801(d)(1)(B) only those prior consistent statements made before a motive to fabricate are admissible; prior consistent statements made after a motive to fabricate are inadmissible. This reading of the rule is based on the language of the rule, interpreted in light of its underlying history, and is supported by many trial and appellate policies.

If this Court adopts the interpretation of the rule advocated by the United States, the statements involved in this case do not meet the threshold standards of relevancy and reliability adopted by those courts that have admitted post-motive prior consistent statements. *Amicus* also suggests that a party seeking to admit prior consistent statements made after a motive to fabricate must show that the circumstances surrounding the making of

the statement demonstrate sufficient indicia of reliability similar to those required in the confrontation cases of this Court. The prior consistent statements involved in this case do not meet these threshold requirements of reliability, and should have been excluded even under the interpretation of the rule advocated by the government.

3. ARGUMENT

I. THE TRADITIONAL RULE IS THE BETTER RULE.

This case concerns the interpretation of Evidence Rule 801(d)(1)(B). Some courts interpret the rule as allowing only the admission of prior consistent statements that precede any motive to fabricate. *United States v. Quinto*, 582 F.2d 224 (2d Cir. 1978) (prior consistent statement must antedate the motive to fabricate). This brief refers to the *Quinto* rule as the traditional rule. *See* Edward D. Ohlbaum, Note, *The Hobgoblin Of The Federal Rules of Evidence: An Analysis Of Rule 801(d)(1)(B). Prior Consistent Statements And A New Proposal*, 1987 B.Y.U. L.Rev. 231, 232 (using this terminology) [hereinafter cited *Ohlbaum*]. Other courts interpret Rule 801(d)(1)(B) more broadly, and also permit the admission of prior consistent statements made after any motive to fabricate, if the statements are relevant. *United States v. Miller*, 874 F.2d 1255 (9th Cir. 1989). This brief refers to the *Miller* rule as the relevancy rule.

1. Basic Rationales: Language and History.

Rule 801(d)(1)(B) provides for the admission of prior consistent statements offered to rebut an express or

implied charge of recent fabrication or improper influence or motive. By its express terms, it is limited to prior consistent statements that rebut the suggestion that the witness's trial testimony reflects a change in position.

Quinto, most often relied on in support of the traditional rule, reasons that a prior consistent statement made after a motive to fabricate simply does not rebut a charge of fabrication. Such a statement adds nothing to the witness's credibility, because it does not help to know that a witness has repeated the same thing many times before. "If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible." 582 F.2d at 235; *see also Ohlbaum*, at 242 ("Since there was no difference between the probative value of the prior statement made after the motive arose and that made in court, such a statement constituted mere repetition, and was therefore merely cumulative and inadmissible.").

Implicit in the traditional rule is the idea that Rule 801(d)(1)(B) contains its own built-in consideration of relevancy and reliability. *Quinto*, 582 F.2d at 232-33. The traditional rule makes the timing of the prior consistent statement the conclusive issue. Statements made before the motive to fabricate are relevant and reliable evidence that rebut a charge of fabrication. Conversely, prior consistent statements made after the motive to fabricate are excluded because they do not "rebut" the charge that the trial testimony has been fabricated. Instead, they show only that the witness repeated his tainted statements.

In contrast, the relevancy rule is based on the assumption that Rule 801(d)(1)(B) does not make the

timing of the statement conclusive. It reflects the view that a *per se* timing rule should give way to a more flexible approach that allows consideration of even prior consistent statements, made after a motive to fabricate, if "other surrounding circumstances" give them "significant probative value." *Miller*, 874 F.2d at 1274. These circumstances must indicate that the prior consistent statement has significant probative force apart from mere repetition. *Id.* Under the relevancy rule, Rule 801(d)(1)(B) contains very limited prerequisites for the admission of prior consistent statements, and Evidence Rules 402 and 403 provide the governing analysis. *Miller*, 874 F.2d at 1272.

In support of their conclusions, courts on both sides of the issue have examined the language of Rule 801(d)(1)(B). Courts following the traditional rule interpret the rule as including a temporal requirement. *Quinto*, 582 F.2d at 234; *see also Ohlbaum*, at 246 (the term "recent" introduces a temporal requirement).

In contrast, those courts following the relevancy rule conclude that the language of the rule does not clearly express that requirement. *See, e.g. United States v. Parodi*, 703 F.2d 768, 784 (4th Cir. 1983) (stating that the rule itself precludes a timing limitation); *United States v. Hamilton*, 689 F.2d 1262, 1273 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983).

The history underlying the rule is helpful and necessary in determining the meaning of the rule. The courts have engaged in an historical analysis. Unfortunately, they disagree on the legal history underlying the rule. *Compare Quinto*, 582 F.2d at 232-34 with *Parodi*, 703 F.2d at

786 (contrary to the assumption in *Quinto*, federal courts before the adoption of the Federal Rules of Evidence were given flexibility and latitude in admitting prior consistent statements).

Quinto characterizes a two-hundred-year general prohibition against the use of prior consistent statements. Exceptions were narrowly drawn only for statements made before the motive to fabricate existed. 582 F.2d at 232. *Quinto* characterized this as the "traditional" standard, and concluded that Rule 801(d)(1)(B) did not intend to alter it. 582 F.2d at 233. Rather, the only change was that prior consistent statements that preceded the motive to fabricate, formerly admissible only to rehabilitate the witness, could now be used as substantive evidence. 582 F.2d at 233-34.

Professor Ohlbaum and Judith Archer agree that the *Quinto* assessment of the history underlying the rule is the correct one. "Courts at common law originally took a narrow view of the admissibility of prior consistent statements. When offered as substantive evidence, prior consistent statements were inadmissible because the statements were hearsay." Judith A. Archer, Note, *Prior Consistent Statements: Temporal Admissibility Standard Under Federal Rule Of Evidence 801(d)(1)(B)*, 55 Fordham.L.Rev. 759, 762 (1987) [hereinafter cited *Archer*]. These statements were deemed unreliable and cumulative. *Id.* at 762-63. Later, they were permitted in response to an attack that a witness's testimony was the result of

recent fabrication or motive, but with the limitation that they had to precede the motive to fabricate. *Id.* at 766.[1]

According to Professor Ohlbaum, the traditional underpinnings of the Rule permitted the admission of a prior consistent statement only where it predated the witness's alleged motive to fabricate. *Ohlbaum*, at 238-39. He concludes that before the promulgation of the Rule in 1975, the treatment of prior consistent statements developed in three stages. In the first stage, prior consistent statements could be admitted without limitation, and were considered substantive evidence. In the second stage, they were permitted to corroborate live testimony, even when the witness had not been impeached. In the third stage, prior consistent statements were no longer permitted on direct examination, and were admissible only to rehabilitate the witness when his credibility had been attacked. In the third stage, prior consistent statements had to have been made before the motive to fabricate arose. *Ohlbaum*, at 234-39.[2]

Against this background, *Quinto's* view that the rule must be interpreted consistently with the law as it had developed just before the adoption of the rule is sound. The language of the rule does correspond to that body of

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[1] Archer states that common law courts also permitted the admission of prior consistent statements under the doctrine of completeness. *Id.* at 766. That doctrine, expressed in Feb. R. Evid. 106, is not in issue here.

[2] There is another law review article the Court might find useful: Graham, *Prior Consistent Statements: Rule 801(d)(1)(B), the Federal Rules of Evidence, Critique and Proposal*, 30 Hast.L.J. 571 (1979) [hereinafter cited *Graham*].

existing law: it requires an allegation of recent fabrication, and it includes the requirement that the prior consistent statement "rebut" the claim of fabrication. Because the language closely reflects the law as it had developed immediately before the adoption of the rule, the language suggests no change in the standard for admission: the prior consistent statement is admissible under the rule only if it preceded the motive to fabricate. *Ohlbaum*, at 245 (Rule 801(d)(1)(B) employs the precise language – " 'rebut[ting] . . . charge[s] . . . of recent fabrication or motive' – consistently used in the panoply of pre-1975 decisions.") It stands to reason that Congress was aware of the common law prerequisite that the prior consistent statement must precede any motive to fabricate, and carefully chose its language in Rule 801(d)(1)(B) to reflect that prerequisite. *United States v. Salerno*, ___ U.S. ___, 112 S.Ct. 2503, 2507 (1992) (assuming that in enacting the Evidence Rules, Congress makes careful judgments about admissibility, and that the plain language of the particular evidence rule governs).

The only change adopted by the Rule in 1975 is that the prior consistent statements, once admitted, could be given substantive effect. This was a relatively minor change that realistically had little effect, since most juries were probably ill-equipped to treat a prior consistent statement as "rehabilitative", yet to understand that it was not to be considered as "substantive evidence". The change simply did away with a distinction that meant nothing to juries anyway. *Archer*, at n.121.

Parodi, however, makes the distinction between rehabilitative and substantive evidence the basis for creating yet a third rule, in addition to the traditional rule and the

relevancy rule, which distinguishes between prior consistent statements used for rehabilitation, and those prior consistent statements used for substantive purposes. Under the *Parodi* approach, any prior consistent statements can be used to rehabilitate, but only those that precede any motive to fabricate can be used as substantive evidence. 703 F.2d at 785-86; *See also United States v. Brennan*, 798 F.2d 581, 587-88 (2d Cir. 1986) and *United States v. Harris*, 761 F.2d 394, 398-400 (7th Cir. 1985) (drawing the same distinction); *Ohlbaum*, at n. 145 (discussing this line of authority).

The *Parodi* approach has been criticized. *Miller* rejects the idea that Rule 801(d)(1)(B) creates different temporal standards for admissibility based on whether the statements are used for rehabilitation or as substantive evidence. 874 F.2d at 1272-73. According to *Miller*, Rule 801(d)(1)(B) expanded the use of the prior consistent statements, but did not create different standards. *Id.* Commentators have also criticized the idea that the rule creates different temporal standards depending on the purpose for which the statements are offered. *Ohlbaum*, at 286-88; *Archer*, at 780.

When the reasoning in *Parodi* is examined, it is questionable whether *Parodi* casts real doubt on *Quinto's* historical analysis. *Parodi's* reliance on Judge Friendly's language in *United States v. Rubin*, 609 F.2d 51, 68-69 (2d Cir. 1979, Friendly, J., concurring), *aff'd*, 449 U.S. 424 (1981), to suggest that post-motive prior consistent statements are freely admissible when introduced for rehabilitation, is incorrect. *Miller*, 874 F.2d at 1273 n.12. Founded on its mistaken view of history, *Parodi's* general conclusion that prior to the adoption of Rule 801(d)(1)(B),

courts had wide latitude to admit prior consistent statements, is not forceful.

Given the common law background prior to the adoption of the rule in 1975, *Quinto's* interpretation of the rule is anchored in legal history, and it is this history that provides a foundation for any interpretation. When the relevancy-rule courts interpret Rule 801(d)(1)(B) as if it were born, full grown, in 1975, and conclude that the language supports their view that flexibility should permit them to assess the admissibility of prior consistent statements, they are mistaken. Their view cannot be squared with the the history of the rule.

2. Flexibility is not an appropriate rationale.

Advocates of the relevancy rule believe that flexibility is an advantage, and that the jury can determine the reliability of any prior consistent statement made after a motive to fabricate. *See, e.g., Hamilton,* 689 F.2d at 1273. By adopting a relevancy standard under Evidence Rule 402, the relevancy-rule courts have adopted probably the broadest and easiest standard for admissibility in all of the evidence rules. Rather than treat Rule 801(d)(1)(B) as a significant rule designed to provide discrete and meaningful treatment of prior consistent statements when used to rehabilitate a witness, the relevancy rule involves Rule 801(d)(1)(B) only peripherally and deflects the governing analysis to either the hearsay rules, or Evidence Rule 402. When relevancy-rule courts rely on flexibility as a rationale, they have relegated Rule 801(d)(1)(B) to second-rate status as an evidence rule.

Advocates of the relevancy rule have uncharitably characterized the traditional rule as "rigid". *Miller,* 874 F.2d at 1274. But flexibility has never been sufficient justification for the admission of evidence. Our evidence rules purposely create limits. They are not designed to create an evidentiary free-for-all, in which any evidence is liberally admitted on the bare justification that the jury can weigh it. On the contrary, our evidence rules create many barriers to evidence, even evidence that is arguably relevant. *See, e.g.,* Fed. R. Evid. 801-804 (hearsay); Fed. R. Evid. 501-510 (privileges); Fed. R. Evid. 404 (generally precluding evidence of character and other bad acts); Fed. R. Evid. 610 (religious beliefs inadmissible to support credibility); Fed. R. Evid. 408 (offers to compromise inadmissible). All of these categories exclude from evidence some evidence that a factfinder could find relevant and useful. Yet our evidence rules, based on years of logic and experience, reflect general decisions about admissibility, relevancy, reliability, public policy, and efficiency. Because they address evidence in a general way, they might sometimes result in the exclusion of evidence that, in a specific case, might actually be reliable, true, and accurate. But that fact does not justify disregarding the particular evidence rule.

For example, the hearsay rules categorize the types of hearsay deemed reliable, and exclude all hearsay statements that do not fall within the firmly rooted exceptions or demonstrate sufficient indicia of reliability to fall within the catch-all exception. The hearsay rules set definite boundaries, and reflect general appraisals of what is reliable. *Idaho v. Wright,* 497 U.S. 805, 817 (1990) ("Admission under a firmly rooted hearsay exception satisfies the

constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."). Presumably, sometimes even hearsay that is inadmissible because it does not fall within an exception might be accurate, relevant, and reliable, yet without a showing that it meets the strict requirements of the hearsay rule exceptions, it is inadmissible. A party offering hearsay evidence, even if it is in fact true and accurate evidence, is not permitted to have the court engage in a case-by-case review of the particular item of evidence to see if it is relevant and true. That, however, is what the courts addressing Rule 801(d)(1)(B) and adopting a relevancy approach have done.

Just as the hearsay rules set definite boundaries for general categories of hearsay evidence, and make no exception for hearsay evidence that is "actually true", it should not matter under Rule 801(d)(1)(B) that a post-motive statement might actually be true in the specific case. The boundary has been set in Rule 801(d)(1)(B), and it allows only the admission of prior consistent statements made before the existence of a motive to fabricate. Just as other evidence rules contain built-in decisions about relevancy, reliability, and courtroom efficiency, there is nothing novel, backward, or "rigid" about a conclusion that Rule 801(d)(1)(B) contains its own built-in decisions about admissibility, including the foundational requirement that only those prior consistent statements that precede any motive to fabricate are relevant and reliable.

Additionally, the relevancy rule puts so much emphasis on other evidence rules for the governing analysis that it makes Rule 801(d)(1)(B) virtually superfluous. Under the relevancy approach, Rule 801(d)(1)(B) becomes a very limited starting point, defining only the general propositions that prior consistent statements must rebut a charge of recent fabrication, and can be used as substantive evidence. Under the relevancy rule, the real analysis is then provided by the hearsay rules, or Evidence Rule 402. When the admission of a prior consistent statement becomes an issue, a party may seek its admission under the hearsay rules, bypassing Rule 801(d)(1)(B) entirely, or it may rely on Rule 801(d)(1)(B) and the inquiry is quickly channeled to Evidence Rule 402. Consequently, under the guise of flexibility, the relevancy approach makes Rule 801(d)(1)(B) a minor evidence rule with no real use. In contrast, under the traditional rule, Rule 801(d)(1)(B) contains its own standards, provides for its own discrete treatment of prior consistent statements when used to impeach, and stands on its own as a meaningful evidence rule.

3. Trial and appellate policies support the traditional rule.

The traditional rule incorporates and is supported by many legitimate policies. It reflects the preference for live testimony under oath, is clear and easy to apply, eliminates unfair bolstering of a witness's testimony, is more efficient, and removes the opportunity to manipulate the trial process.

A. The preference for live testimony under oath.

Our law has frequently expressed a preference for statements, made under oath, and subject to confrontation. *Ohio v. Roberts*, 448 U.S. 56, 63, n.6 (1980); *Graham*, at 593 (there is a preference for testimony under oath over out-of-court repetition). These requirements reflect the view that in-court testimony is much more valuable, and more accurate, than out-of-court declarations. *Ohio v. Roberts*. The traditional rule is more consistent with these principles, because it puts a premium on live testimony. It requires a litigant to make his case in court, with statements made under oath and subject to confrontation. It does not allow the use of out-of-court statements, not made under oath, to support a case.

B. Ease and clarity of administration.

The traditional rule establishes a bright-line rule that is easily applied. Under this approach, the judge only needs to determine when the motive to fabricate arose, and can determine this prerequisite to admission as a factual matter. Fed. R. Evid. 104. In contrast, the relevancy rule imposes standards on admission apart from any temporal requirements. The application of these standards creates a difficult task for the trial court.

This case also demonstrates how the relevancy approach creates inaccuracy on appeal. In the search for standards under the relevancy approach, we run the risk that motivations will become generic, with appellate courts effectively classifying some motives as legitimate,

and others as weak. We run the risk that courts will turn to the written decisions of other courts to determine whether, for example, a child's desire to live with one parent over another is strong or weak. The Tenth Circuit did that here, relying on *United States v. Payne*, 944 F.2d 1458 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1598 (1992). Because *Payne* concluded that the fact that a sexually abused foster child may have been angry and falsely accused defendant for revenge was speculative, the Tenth Circuit here used *Payne* to support its own conclusion that A.T.'s motive was not sufficiently strong. *United States v. Tome*, 3 F.3d 342, 351 (10th Cir. 1993). Yet motives are highly personal, highly variable, and do not lend themselves to such a general approach.

Conversely, if we require courts to indulge in such factbound inquiries, we run the risk that the law will develop in a hodgepodge of holdings, with rulings on similar facts going different ways. The law's application becomes arbitrary and standardless. When the issue is reviewed on appeal, generally for an abuse of discretion, reviewing courts are denied the ability to fashion consistent standards and boundaries.

C. Considerations of efficiency and unfair bolstering.

The traditional rule will result in cleaner, shorter trials; cumulative evidence will be lessened or eliminated. *Graham*, at 581 n.22. In contrast, under the relevancy rule, one side may be permitted to parade in multiple witnesses to repeat what a witness has already told the jury. That aspect of the relevancy rule worked unfairly here,

because it created the unacceptable risk that A.T.'s testimony would become more credible when it was repeated by experts and health professionals. *See United States v. Mazza*, 792 F.2d 1210, 1215 (1st Cir.) ("the government effectively managed to have the jury hear a second-hand account of [the informant's] entire story through witnesses the jury was less apt to question"), *cert. denied*, 479 U.S. 1086 (1987). This risk is multiplied in a case like this, in which jurors may well be in unfamiliar territory, and will incorrectly assume that health experts in child sexual abuse have special insight into the child's credibility. The jurors might improperly conclude that the expert would not be repeating the child's statements if they were not true. In this way, the government is unfairly permitted to bolster its case with out-of-court statements. *Mazza*, 792 F.2d at 1215. This case shows how the government, in child sexual abuse cases, can have a field day with prior consistent statements that have no particular reliability.

D. Preventing the manipulation of the trial process.

The traditional rule is also preferable because it removes the temptation to manipulate the trial process. Permitting the admission of post-motive prior consistent statements creates the danger that a party may manufacture favorable testimony by ensuring that out-of-court statements are repeated to many people. *Miller*, 874 F.2d at 1275. While *Miller* expresses its concern that "criminal suspects" will manufacture testimony in this way, the concern is equally applicable to prosecutors and civil litigants, who will be encouraged to manipulate the trial

process by manufacturing as many favorable post-motive statements as possible. *United States v. Montague*, 958 F.2d 1094, 1098 (D.C. Cir. 1992) (recognizing that under the relevancy rule the prosecutor or an F.B.I. agent might question a witness immediately before trial for just the purpose of bolstering the testimony, allowing the jury to hear the statement directly and then again in the perhaps more credible voice of the agent); *Allison v. State*, 162 So.2d 922, 924 (Fla. Dist. Ct. App. 1964) (condemning the possibility, in a criminal case, that a witness's testimony could be blown up out of all proportion to its true probative force).

A judge can protect against this type of abuse, as the court in *Montague* concluded, but as a practical matter it will be difficult for a party to prove that this improper strategy has been pursued. In criminal cases, a defendant will have a difficult time proving that this strategy has been formulated, since he has no access to what goes on in the prosecutor's office. In civil cases, a party will be similarly hampered to discover what goes on in his adversary's office. By nature, the improper motive underlying these attempts to manufacture testimony will be secretive. Additionally, the ill-motivated strategy can easily be disguised as thorough trial preparation or some other legitimate pretrial activity. Litigants and judges should not be placed in the difficult position of proving or ruling on this issue. All temptation to manipulate the trial process can be removed by the adoption of the traditional rule.

Conclusion

When the language of Rule 801(d)(1)(B) is viewed in its proper historical context, it includes the requirement that the prior consistent statement must precede any motive to fabricate. This interpretation is also amply supported by trial and appellate policies. Judges may be capable of applying even the illusive standards and inquiries involved in the relevancy rule, but it is questionable whether the effort is worth its significant cost.

II. EVEN UNDER THE RELEVANCY RULE, PETITIONER SHOULD PREVAIL.

If the Court adopts the relevancy test, *amicus* respectfully contends that A.T.'s prior consistent statements should have been excluded even under that test. Contrary to the Tenth Circuit's conclusions, there is nothing about the statements that makes them reliable or trustworthy. Instead, they fall within the category of mere repetition.

1. Relevancy and reliability standards under 801(d)(1)(B).

The standards formulated by relevancy rule courts are designed to determine whether the post-motive statements are relevant and reliable. It is not clear, however, how probative they must be. *Miller* makes the standard relevancy under Evidence Rule 402 (more probable than not), yet later repeatedly requires "significant probative value" and "significant probative force". 874 F.2d at 1273-74. "Significant probative value" suggests a higher

standard than simple relevancy. *Parodi* defines the standard as "sufficient indicia of reliability." 703 F.2d at 787. Although the courts have discussed the Rule 801(d)(1)(B) analysis in terms of basic relevance, *Miller*, it oversimplifies to define the inquiry as one of relevance. Rather, it appears that in this context reliability is really the issue, and that reliability is what results in relevance. *See, e.g., Daubert v. Merrill Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786, 2797 (1993) (linking reliability and relevancy).

2. The Tenth Circuit's assessment of A.T.'s motive to fabricate is incorrect.

In this case, the court considered three factors: 1) the strength of the motive to lie; 2) the circumstances in which the statement is made; and 3) the declarant's demonstrated propensity to lie. 3 F.3d at 350. In *Miller*, the court required "significant probative value" to be indicated by an assessment of the motivation to fabricate ("a very crucial factor"). 874 F.2d at 1274. It suggested that the "surrounding circumstances" must also be considered. *Id.*

This evaluation is problematic. Motives are highly personal and defy generalization. Different people want different things, for different reasons, and with different conviction. When any court engages in an assessment of the strength and quality of a person's motive, it enters into a difficult inquiry. This case demonstrates that.

Here, the Tenth Circuit determined that a four or five-year-old child's desire to live with one parent over another is "not particularly strong." 3 F.3d at 351. This

assessment is very questionable. For a young child of divorced parents, the person he lives with may well be the most important circumstance in his life. It determines countless significant details, such as where he will live, what school he will attend, the availability of friends, what he will eat, what clothes he will wear, what television shows he may watch, and how often he will have his way. Also, children go through various developmental stages, during which they bond more strongly to one parent. Additionally, where, as here, a child is the subject of a custody battle, pressure might be applied to convince him to favor one parent over the other. This pressure might increase at the end of a long stay with one parent, when it is time for custody to change. Finally, children can be manipulative to get what they want, even at an extremely young age, and can also be manipulated. For these reasons, *amicus* respectfully suggests that the Tenth Circuit's assessment that A.T.'s motivation to fabricate was not "particularly strong" is incorrect.

3. Reliability guidelines in the confrontation cases of this Court may also provide useful guidelines under Rule 801(d)(1)(B).

If this Court adopts the relevancy rule, *amicus* respectfully suggests that the Court's analysis in some confrontation cases may provide analogous and useful guidelines, under Rule 801(d)(1)(B). Although the 801(d)(1)(B) relevancy rule cases do not engage in a confrontation analysis, the question is similar to the one raised in some confrontation cases. *See, e.g., Idaho v. Wright* (determining whether, given the surrounding circumstances, a child's out-of-court statement to a

physician was reliable enough to warrant admission); *Ohio v. Roberts* (determining whether an out-of-court statement has particularized guarantees of trustworthiness); *Lee v. Illinois*, 476 U.S. 530 (1986) (determining whether codefendant's out-of-court statement has sufficient indicia of reliability to warrant admission).

Many of the same factors used in the confrontation setting to determine "indicia of reliability" are the same or similar to those advocated in relevancy rule cases. For example, confrontation analysis and relevancy rule analysis both look to the circumstances surrounding the making of the out-of-court statement to determine its reliability. *Compare Idaho v. Wright*, 497 U.S. at 820-21 (indicia of reliability to be drawn from the totality of the circumstances surrounding the making of the statement) with *Miller*, 874 F.2d at 1274 (surrounding circumstances may give sufficient reliability) and *Tome*, 3 F.3d at 350 ("the circumstances in which it is made"). Under both analyses, statements against penal interest are considered more reliable. *Compare United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1980), *cert. denied*, 103 S.Ct. 77 (1982) (whether out-of-court statement is against penal interest is a consideration under confrontation analysis) with *United States v. Sampol*, 636 F.2d 621 (D.C.Cir. 1980) and *Parodi*, 703 F.2d at 787 (whether prior consistent statement is against penal interest is a factor under relevancy rule analysis). Self-serving statements are given little credence. *Compare Lee*, 476 U.S. at 544-45 (an attempt to shift blame makes statement unreliable) with *Miller*, 874 F.2d at 1274 (statements too self-serving to have significant probative value). Statements made in a bargain for leniency are suspect. *Compare State v. Earnest*, 744

P.2d 539, 540 (N.M.) (in confrontation setting, fact that statement was not made in an attempt to gain leniency gave reliability), *cert. denied*, 484 U.S. 924, 108 S.Ct. 284 (1987) with *Miller*, 874 F.2d at 1275 (statements made during criminal investigation are unreliable) and *Montague*, 958 F.2d at 1098 (promise of leniency and issue). However, any consideration of whether a prior statement has "sufficient indicia of reliability" should depend solely on the circumstances surrounding its making, not whether it is corroborated by other evidence at trial. *See Idaho v. Wright*, 497 U.S. at 820-21.

The idea that the threshold of reliability for prior consistent statements and some hearsay can be equated does not require a leap of faith. It makes sense that when the issue is reliability, certain factors will always be useful. It also makes sense that because the basic inquiry in both the confrontation setting and the 801(d)(1)(B) setting is the declarant's motive to lie, the factors bearing on reliability will be the same.

4. A.T.'s statements do not demonstrate sufficient indicia of reliability.

If the essential prerequisite for admitting prior consistent post-motive statements is that such statements must present sufficient "indicia of reliability" and "particularized guarantees of trustworthiness", this Court has already concluded that statements similar to the ones presented in this case do not meet that test. *Idaho v. Wright.*

Conclusion

When the language of Rule 801(d)(1)(B) is viewed in its proper historical context, it includes the requirement that the prior consistent statement must precede any motive to fabricate. If, however, this Court concludes that post-motive prior inconsistent statements are admissible under Rule 801(d)(1)(B), then A.T's statements should have been excluded because they are not sufficiently reliable under existing standards formulated by the relevancy-rule courts, or under analogous guidelines announced by this Court in confrontation cases.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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INTEREST OF THE AMICI CURIAE

The States that have joined this brief as amici curiae obtain numerous criminal convictions each year, and must defend those convictions on direct appeal, in state post-conviction proceedings, and often in federal habeas actions as well. In particular, the amici States prosecute an increasing number of child abuse cases, many of which involve some form of sexual abuse perpetrated upon a young child. Thus the specific issue raised in this case, which concerns the circumstances in which a child witness will be permitted to testify about this alleged abuse and to have his or her testimony buttressed and rehabilitated when it is impeached by the criminal defendant, is a recurring issue that often could prove decisive in reaching a verdict in such cases.

The interest of the amici States in the proper application of Rule 801(d)(1)(B) of the Federal Rules of Evidence is significant even outside the particular circumstances of this case involving the alleged sexual abuse of a child, for three reasons. First, the amici States often try civil cases in the federal courts, and the resolution of the existing disagreement about how properly to apply Rule 801(d)(1)(B) will have a direct effect on the trial of many such cases. Second, the amici States have an indirect but substantial interest in all criminal cases that are tried in the federal courts and that are based on alleged criminal activity which has occurred within their borders, as such cases squarely affect the public safety that each State seeks to protect. Third, most of the amici States have their own evidentiary rules analogous to Rule 801(d)(1)(B); and though the Court's decision in this case will not bind any state court in interpreting its own rule, it is likely that the decision in this case will have a great practical effect on the future interpretation and application of such rules.

In addition, the state courts, like the lower federal courts, are divided on the proper application of their own rules which are directly analogous to Federal Evidence Rule 801(d)(1)(B), even though the language of those state rules may be either exactly the

same or similar in all material respects to that contained in the federal rule.[1] Clear guidance from this Court that the language of Rule 801(d)(1)(B) is to be applied as it is written, and that any ancillary issues bearing on relevancy or other such considerations are to be assessed under other evidentiary rules that explicitly address such matters, is greatly to be desired and again is likely to have a salutary effect on state courts in arriving at the most persuasive interpretation and application of their analogous rules. That most persuasive view is the one adopted below in this case by the Court of Appeals for the Tenth Circuit.

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[1] *Compare, e.g., State v. Gardner*, 490 N.W.2d 838 (Iowa 1992) (trial court must determine whether "post-motive" statement is relevant and probative); *People v. Hayes*, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874 (1990) (trial court should determine weight to be given to "post-motive" statement), *cert. denied*, 112 S. Ct. 420 (1991); *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986) ("post-motive" statements are admissible), *with State v. Younger*, 453 N.W.2d 834 (S.D. 1990) (applying "pre-motive" limitation to bar admissibility); *Chambers v. State*, 726 P.2d 1269 (Wyo. 1986) (same); *State v. Arndt*, 285 N.W.2d 478 (Minn. 1979) (same).

ISSUE PRESENTED

Whether out-of-court statements of a child sexual abuse victim were properly admitted at trial pursuant to Rule 801(d)(1)(B) of the Federal Rules of Evidence.

SUMMARY OF ARGUMENT

This Court should interpret and apply Rule 801(d)(1)(B) in accordance with its plain language, which states that prior consistent statements are properly admitted as permissible nonhearsay whenever they are offered to rebut an express or implied charge of recent fabrication or improper influence or motive raised against the declarant. Some courts have created an additional requirement, which they have improperly read into the rule, that the prior consistent statements must have been made before any supposed motive to lie is alleged to have arisen. Any such extratextual requirement would undermine the utility and purpose of the Rule and should not be embraced by this Court.

Petitioner contends that the extratextual limitation he urges upon this Court is consistent with the approach that was developed at the common law. This contention, however, is either irrelevant or wrong, for three reasons. First, it abstracts from the considerable disagreement that existed among the common-law courts on this issue. Second, it seeks to gloss over the dramatic changes that occurred in this doctrine when the Federal Rules of Evidence were adopted. Third, it fails to come to grips with this Court's clear direction that where the text of a Federal Rule of Evidence appears to differ from the common law, the federal courts are to apply the text of the Rule as it was written and adopted rather than distorting the text and ignoring the superseding effect of the new Federal Rules.

The proper approach instead is that if prior consistent statements are properly proffered under Rule 801(d)(1)(B), then any other circumstances that may be pertinent in determining the

admissibility of such statements should be judged in accordance with the general provisions of the Federal Rules of Evidence that were formulated for making such determinations. In particular, any factors that are claimed to bear upon the probative value of the prior consistent statements, such as the nature of the alleged motive to fabricate, the strength of any such alleged motive, its origin and duration, and any countervailing motives or circumstances, should be assessed by weighing the relevancy of such statements in light of the other considerations expressly set forth in Rules 402 and 403.

In addition, this case resulted in a conviction for aggravated sexual abuse of a child. In several prior rulings, this Court has recognized and accommodated the substantial public interest in ensuring that the testimony of children who are victims of crime can be admitted in prosecutions of those who perpetrate such crimes. The same substantial public interest should be recognized and applied in this case as well. The Court therefore should offer guidance in this case to the lower courts, indicating that the necessity of protecting and encouraging child victims to testify against their attackers is a relevant factor that should be given substantial weight in making the case-by-case judgments that are necessary to determine the admissibility of prior consistent statements under Federal Rules of Evidence 801(d)(1)(B), 402, and 403.

ARGUMENT

I. PRIOR CONSISTENT STATEMENTS ARE PROPERLY ADMITTED AS PERMISSIBLE NONHEARSAY UNDER FEDERAL EVIDENCE RULE 801(d)(1)(B) WHENEVER THEY ARE OFFERED TO REBUT AN EXPRESS OR IMPLIED CHARGE AGAINST THE DECLARANT OF RECENT FABRICATION OR IMPROPER INFLUENCE OR MOTIVE.

Pursuant to the specific terms of Federal Rule of Evidence 801(d)(1)(B), a declarant's out-of-court statement is not to be excluded as hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." In this case, the defendant sought to impeach the testimony presented by A.T., the child declarant, by suggesting that she had a motive to lie because she would prefer to be living with her mother rather than with her father. Under these circumstances, the Tenth Circuit properly applied Rule 801(d)(1)(B) by admitting several prior statements made by the girl that were consistent with her testimony in court, all of which were offered to rebut the implied charge that she was lying on the stand.

A. The Language of the Rule.

By its terms, Rule 801(d)(1)(B) imposes specific conditions that must be met before a prior consistent statement becomes admissible at trial. The requirements set out in the Rule are:

> 1) the declarant must testify at trial and must be subject to cross examination concerning the statement; and 2) the statement must be consistent with the declarant's testimony and must be offered to rebut an "express or implied charge of recent fabrication or improper influence or motive."

United States v. Payne, 944 F.2d 1458, 1470 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1598 (1992). These are the only requirements found within the Rule itself that govern the admissibility of such statements.

In this prosecution for aggravated sexual abuse of a child, the declarant A.T. testified at trial and was subject to cross-examination. Indeed, the Court of Appeals properly rejected the suggestion made by the defense that she was not "subject to cross-examination" because she was unresponsive to certain questions. Instead, the Court of Appeals cited this Court's holding in *United States v. Owens*, 484 U.S. 554, 561 (1988), that the more natural reading of this requirement would find it to be satisfied when the witness is physically present, takes the stand, and testifies under oath, even if the witness is forgetful in some respects or is unable to answer all the questions put to him. Pet. App. 9-14.

In addition, both the District Court and the Court of Appeals properly found that A.T.'s prior statements were consistent with her testimony and were offered to rebut the defense's implied charge that she had an improper motive to lie because she wanted to live with her mother rather than with her father. The defense had aggressively raised this issue during its questioning of A.T. on cross-examination, and thus opened the door to an attempt by the prosecution to rehabilitate its chief witness to the events at issue here, *viz.*, the child who was abused by the defendant. The prosecution's use of prior consistent statements was thus entirely appropriate as contemplated under Rule 801(d)(1)(B).

In reaching this conclusion, the Court of Appeals also quite properly rejected the defense's contention that a "pre-motive"

restriction should be read into the Rule. It gave two reasons for rejecting any such restriction. First, "the text of the rule is silent on this point." Pet. App. 15. Second, the argument that is most frequently made for such a restriction turns on an assessment of whether such statements are likely to be relevant to the matters at issue in the case. Under the Federal Rules of Evidence, however, this determination is one that should be made in accordance with Rules 402 and 403, taking into account a variety of possible factors that may differ from case to case. Pet. App. 16-19.

The Court of Appeals thus set forth a proper application of Rule 801(d)(1)(B). As noted previously, the "pre-motive" restriction urged by Petitioner simply does not comport with the language of the Rule. Although the drafters could easily have written such a restriction into the Rule, they chose not to do so. Instead, they stated only that prior consistent statements must be "offered to rebut" a charge of "recent fabrication or improper influence or motive." Fed. R. Evid. 801(d)(1)(B).

Petitioner offers two arguments from the text of the Rule to support his position, both of which are unavailing. Initially, he contends that such statements must be offered to rebut a charge of improper motive, but they cannot succeed in rebutting any such charge if they are merely duplicative of the declarant's testimony and may be premised on the very same improper motive. Pet'r Br. 17-21. This contention is flawed for three reasons. First, it rests upon a strained interpretation of the phrase "offered to rebut." There is no question, for example, that in this case A.T.'s prior consistent statements were "offered to rebut" the implied charge of improper motive, and it was for the trier of fact to determine whether they succeeded in doing so. Petitioner errs by offering an unnaturally demanding reading of the term "rebut," claiming that unless the declarant's prior statements conclusively rebut the charge made, they are not even being "offered to rebut" it. This argument is perhaps best answered by analogy to *Owens, supra*. Just as the "more natural" understanding of the phrase "subject to cross-examination" was simply that the witness was

available to be cross-examined, although he may have been unable to give perfect or complete answers to every question put, *see* 484 U.S. at 561, even so the declarant's prior statements are "offered to rebut" the implied charge here of improper motive even though they may not decisively refute that charge such that a trier of fact could not conceivably find to the contrary.

A second response to Petitioner's initial argument is that it simply represents a thin attempt to disguise and avoid the ultimate determination of relevancy by disqualifying such statements as an initial matter. In essence, Petitioner claims that because a charge of improper motive has been raised to explain away such statements, they cannot even properly be considered relevant to the case and thus should be excluded in every possible instance. Not only does this claim beg the question of credibility that must ultimately be determined by the finder of fact, but it also would suggest, for the same reason, that such an attack on the credibility of the witness should render even the same statements made while the witness is on the stand just as irrelevant. Any such suggestion, however, would plainly be absurd.

Third, Petitioner's whimsical reading of the phrase "offered to rebut" is also wrong on whether such statements are actually relevant to the case. Even if all such statements ever made by the declarant were made while she harbored a possibly improper motive, it still is a question of credibility for the trier of fact to determine whether she was and is a liar. Put differently, even if A.T. has always wanted to live with her mother rather than with her father, that does not mean she has not told the truth about her experience of sexual abuse by Petitioner. As the Advisory Committee noted, a prior statement may well be more likely to be true because it "was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation." Fed. R. Evid. 801(d)(1)(B) Adv. Comm. notes. And here, as the Court of Appeals observed and as

discussed in more detail in Part II, *infra*, other factors also indicate that, more likely than not, A.T.'s prior statements would be of some probative value in this case.

Petitioner's other textual argument is that the adjective "recent" should be read to modify not only the succeeding noun "fabrication," but also the independent additional clause, "improper influence or motive." Pet'r Br. 21-23. The improbable claim is thus that the drafters of the Rule meant to say, though they did not in fact manage to say, that prior consistent statements are admissible only when they are offered to rebut a charge of "recent fabrication or recent improper influence or recent improper motive." Quite aside from the resulting implausible stacking of adjectives, this distortion of the actual language is hardly a natural reading from any standpoint.

Even more important, this suggested interpretation of the Rule fails to do justice to the kinds of situations that must be confronted under the Rule on an everyday basis, as exemplified by the facts of this very case. Here Petitioner contended that A.T.'s prior statements were made under the "improper influence or motive" that the child wanted to live with her mother rather than with her father. But even if that alleged influence or motive were recognized and accepted as being present here, it may well have existed throughout the girl's life. There is no clear suggestion in the record just when this preference was supposed to have arisen, but it is worth noting that the divorce of her parents occurred almost two years before A.T. made the statements at issue in this case, and a shared custody arrangement had been in place ever since. Thus, it is questionable whether the supposed improper influence or motive was indeed of "recent" vintage in this case, which is crucial to Petitioner's erroneous reading of the Rule.

This same problem, however, is likely to arise in many such cases. The drafters of the Rule simply did not intend or provide for a party to be able to impeach a witness by alleging improper motive, without any obvious or recent genesis, and then

exclude all countervailing efforts to rehabilitate the witness by introducing prior consistent statements on the ground that those statements postdate the alleged motive. In such circumstances, Petitioner's argument about the importance of the term "recent" would become a cloak for excluding statements even where the alleged motive to lie, as in this case, was not necessarily of recent origin. Instead, such statements are to be admitted where they are offered to rebut a charge of "improper influence or motive," whether or not it is alleged to have arisen just recently, as long as the trial court properly determines that the factors surrounding the making of such statements indicates that they are likely to be relevant to the determinations which must be made by the trier of fact.

B. The Principles of the Common Law.

Petitioner's alternative argument is based upon principles that he contends were developed and accepted at the common law and were carried forward by the adoption in 1975 of the new Federal Rules of Evidence, specifically in Rule 801(d)(1)(B). Pet'r Br. 23-31. He correctly notes that several courts have chosen to import a "pre-motive" restriction into the Rule because they had taken this approach at the common law and they believed that the drafters of the Rule should be understood to have codified that approach. *See United States v. Quinto*, 582 F.2d 224, 232-34 (2d Cir. 1978); *United States v. Henderson*, 717 F.2d 135, 138 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984). Yet Petitioner's argument glosses over the lack of consensus on this issue at the common law, ignores dramatic changes that were made to prior case law in Rule 801(d)(1)(B), and fails to apply the broader schematic approach that this Court embraced in construing the Federal Rules of Evidence in *Bourjaily v. United States*, 483 U.S. 171 (1987).

Prior to the adoption of the Federal Rules of Evidence in 1975, the common-law position on the admissibility of prior consistent statements underwent substantial evolution. One of the

earliest positions to emerge was that a witness's statement made at trial could be corroborated by any and all prior consistent statements, without limitation, and the prior statements could be relied upon as substantive evidence in the case. E. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. Rev. 231, 239. By the mid-nineteenth century, however, the general development of more elaborate hearsay rules came to be reflected in this particular doctrine as well. As a result, prior consistent statements were generally prohibited as substantive evidence, but continued to be admissible for the purpose of rehabilitating a witness whose credibility had been attacked. *Id.* In applying the common-law rule to allow the rehabilitation of such a witness, some courts -- though by no means all -- began to import a further requirement that for a prior consistent statement to be admissible in court to rehabilitate a witness, the statement must have preceded the occurrence of any circumstances that gave rise to an alleged motive to lie. *See, e.g., United States v. Corry*, 183 F.2d 155, 157 (2nd Cir. 1950); *Malone v. United States*, 94 F.2d 281, 287 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938). *But see United States v. Gandy*, 469 F.2d 1134, 1134-35 (5th Cir. 1972) (prior consistent statements should be admitted without regard to their timing), *cert. denied*, 410 U.S. 986 (1973); *Hanger v. United States*, 398 F.2d 91, 104 (8th Cir. 1968) (same), *cert. denied*, 393 U.S. 1119 (1969). Yet the Uniform Rule that was devised over this same period, and which had some influence on the developing case law in the federal and state courts, would have simply allowed the admission and use as substantive evidence of "any out-of-court statement of a declarant who is present at the trial and available for cross-examination." *See* Fed. R. Evid. 801(d)(1)(B) Adv. Comm. notes (describing provisions of Uniform Rule 63(1)).

When the Federal Rules of Evidence were adopted in 1975, the treatment of prior consistent statements underwent further change. The most significant departure in Rule 801(d)(1)(B) from the more recent practice under the common law

was to enlarge the permissible use of prior consistent statements by permitting them once again to be introduced and relied upon as substantive evidence, and not simply used for the more narrow purpose of rehabilitating a witness. *See* Fed. R. Evid. 801(d)(1)(B) Adv. Comm. notes. The Advisory Committee notes do not directly address the "pre-motive" issue, but strongly suggest that a broad usage of prior consistent statements was intended under the new Rule, stating:

> (B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission into evidence, no sound reason is apparent why it should not be received generally.

Id. (emphasis added). This approach, which reflects a self-conscious departure from principles developed at the common law, casts considerable doubt on Petitioner's contention that restrictions imposed at the common law on the use of such statements -- even if there were consensus about any such restrictions, which there was not -- should be read into Rule 801(d)(1)(B) by mere implication.

The legislative history on the adoption of Rule 801(d)(1)(B) does not address with any clarity how the Rule should be applied in particular circumstances such as those raised in this case. *See* H.R. Rep. No. 1597, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7098; S. Rep. No. 1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7051; H.R. Rep. No. 650, 93d Cong., 1st Sess., *reprinted in* 1974 U.S.C.C.A.N. 7075. Perhaps the only relevant statement in the legislative committee reports, which actually is made about prior *in*consistent statements and echoes a comment made in the Advisory Committee notes, is that

"[t]he prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play." S. Rep. No. 1277, *supra*, 1974 U.S.C.C.A.N. at 7062. This observation, of course, would counsel in favor of a broad use of prior statements at trial.

Since the adoption of Rule 801(d)(1)(B), the federal courts have differed on the effect, if any, that their former views at the common law about the use of prior consistent statements should have in determining how the Rule should be interpreted and applied. *See United States v. Harris*, 761 F.2d 394, 399 (7th Cir. 1985) (court held, in explicit disregard of the language and explanation of the Rule, that a prior consistent statement that postdates an alleged motive to lie may be used to rehabilitate but not as substantive evidence); *Henderson*, 717 F.2d at 138 (prior consistent statement is admissible only if it was made prior to the time the alleged motive arose); *United States v. Parry*, 649 F.2d 292, 296 (5th Cir. 1981) (adhering to its previous common-law view, which was that a prior consistent statement may be admissible regardless of whether the statement was made before the alleged motive arose).

As there continue to be different views among the federal courts both about what the proper common-law principles are on this issue and about what importance any such principles should continue to have in the face of the text of Rule 801(d)(1)(B), the amici States contend again that a proper interpretation of the Rule must be drawn from within "the language of the Rule itself," and not from the ragged inconsistencies of the common law. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). Many of the lower courts have properly so held. *See, e.g., United States v. Montague*, 958 F.2d 1094, 1098 (D.C. Cir. 1992); *United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989); *United States v. Pendas-Martinez*, 845 F.2d 938, 942 n.6 (11th Cir. 1988); *Parry*, 649 F.2d at 296.

On this score, this Court's analysis in *Bourjaily* presents the proper and controlling analysis here as well. In that case, several issues were raised concerning the admissibility of statements under Federal Rule of Evidence 801(d)(2)(E), which, like the Rule at issue in this case, presents specific exceptions to standard hearsay rules. An essential point in the case was that the text of the Federal Rules of Evidence appeared inconsistent with prior decisions rendered by this Court before the new Rules were enacted in 1975, including one decision rendered as recently as 1974. 483 U.S. at 176-79. This Court uncompromisingly declared that the new Rules "now govern the treatment of evidentiary questions in federal courts." *Id.* at 177. As in this case, the Court observed that many lower courts had interpreted the new Rules to retain a particular common-law principle "unscathed," and thus had held that the new Rule "does not mean what it says. We disagree." *Id.* at 178. In response to the further argument that Congress "evidenced no intent to disturb the [previous common-law] approach, and we should not find that Congress altered the rule without affirmative evidence so indicating," this Court was again unequivocal: "It would be extraordinary to require legislative history to confirm the plain meaning of [the Rule]." *Id.* (emphasis in original). The same schematic approach to interpreting the Federal Rules of Evidence applies foursquare in this case as well.

II. ANY OTHER CIRCUMSTANCES THAT MAY BE RAISED IN CONTESTING THE ADMISSIBILITY OF PRIOR CONSISTENT STATEMENTS WHICH ARE PROPERLY PROFFERED UNDER RULE 801(d)(1)(B) SHOULD BE JUDGED BY ASSESSING THEIR BEARING UPON RELEVANCY AND THE OTHER CONSIDERATIONS EXPRESSLY SET FORTH IN RULES 402 AND 403.

One of the primary reasons many lower courts have given for importing a "pre-motive" requirement into Rule 801(d)(1)(B) is the flat assertion that prior consistent statements are "of no probative value to rebut an allegation of recent fabrication when the declarant's motive in making both statements was the same for the simple reason that more repetition does not imply veracity." *Harris*, 761 F.2d at 399. If all that these cases involved were merely dull repetition of the same statement in the identical circumstances, then this statement would have more force. As this case shows, however, and as the Court of Appeals properly observed below, there are many different factors that may bear on the probative value of prior consistent statements. As a result, a *per se* rule of inadmissibility is inappropriate. Instead, the relevancy and ultimately the admissibility of such statements should be judged by the trial court under the mechanisms provided in the Federal Rules of Evidence for making those determinations, which are Rules 402 and 403.[2]

The Court of Appeals correctly concluded here that the proper analysis of the admissibility of prior consistent statements

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[2] This Court confronted a similar issue in *Bourjaily*, where the adoption of Federal Rules of Evidence 104 and 1101, and their application to determinations of admissibility, were found to have a direct effect on the proper reading of Rule 801(d)(2)(E). *See* 483 U.S. at 177-79.

was laid down by the Ninth Circuit in *United States v. Miller*, 874 F.2d at 1272-74. There the court discussed the "pre-motive" requirement in detail, and finally declined to import such an "untenable limit on Rule 801(d)(1)(B)," concluding that any such rigid bar against prior consistent statements could not be justified if it were applied "without regard to other surrounding circumstances that may give them significant probative value." *Id.* at 1273-74 & n.12. On some occasions, the court noted, such statements amount to nothing more than mere repetition juxtaposed against a powerful motive to fabricate. But on other occasions, the motive to fabricate may be less powerful, and the circumstances surrounding the prior statements "may give them significant probative value." *Id.* at 1274.[3]

In the course of rejecting any "rigid *per se* [pre-motive] rule," *Miller*, 874 F.2d at 1274, the Ninth Circuit also examined the contrary holding of the Seventh Circuit in the *Harris* case. The court noted, ironically, that *Harris* had also recognized that the pre-motive requirement emerges from the relevancy concerns of Rules 402 and 403, rather than from anything that can be found within the language of Rule 801(d)(1)(B). Nonetheless, *Harris* had inexplicably and incorrectly read this requirement into Rule 801(d)(1)(B) itself. *See Miller*, 874 F.2d at 1272, citing *Harris*, 761 F.2d at 399 ("Thus, although a prior consistent statement may meet the literal requirements of Rule 801(d)(1)(B), it may nonetheless be inadmissible for failure to meet the relevancy requirement of Rule 402."). Instead of taking this same inexplicable leap, the *Miller* court declined to read this restriction into Rule 801(d)(1)(B) and instead concluded that the determination

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[3] In addition to the kinds of factors identified by the Advisory Committee, such as the fact that the prior statements were made closer in time to the events described and often will have been made outside of the pressures and incentives caused by an actual courtroom trial, other factors might include such matters as the context of the statement, the identity of any persons present, and the manner in which the statement was made.

of relevancy is properly left to the discretion of the trial judge under Rules 402 and 403. *See* 874 F.2d at 1274.

The amici States emphatically agree that these determinations are properly left to the discretion of the trial judge under Rule 402 (to determine relevancy) and Rule 403 (to balance probative value against prejudice and other countervailing factors). It is also proper, as observed both by the Court of Appeals here and by the Ninth Circuit in *Miller*, to regard the declarant's plausible motive to lie as only one factor that is not alone decisive of the issue, but instead is still an important or even a "crucial" factor in determining the admissibility of prior consistent statements. Pet. App. 17; *see also Miller*, 874 F.2d at 1274. The rejection of an unwarranted bar against such statements when they postdate an alleged motive to lie thus does not automatically guarantee that all such statements will be admitted at trial. Indeed, an illustrative application of this approach is the *Miller* case itself, where the Ninth Circuit found that some statements were properly excluded under this test and others were properly admitted. *See id.* at 1274-75. Thus, under Federal Rules of Evidence 402 and 403, if the prior statement has no relevancy to the issue at hand, or if it is relevant but its probative value is substantially outweighed by the danger of unfair prejudice, then the evidence would be ruled inadmissible.[4]

In applying Rules 402 and 403, the trial court should also take care to "examine the circumstances under which the statement

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[4] The amici States also agree with the Court of Appeals below and with the Ninth Circuit in *Miller* that "the standards for admission under Rule 801 (d)(1)(B) are the same whether the evidence is offered substantively or for rehabilitation," Pet. App. 17 n.8; *Miller*, 874 F.2d at 1273, which follows directly from the expansion in the use of such statements that was specifically approved by the drafters of Rule 801(d)(1)(B). The amici States would urge the Court to take the opportunity in this case to clear up any confusion that may continue to surround this issue.

was made." *United States v. Hamilton*, 689 F.2d 1262, 1273 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983). Thus, when there "are other indicia of reliability surrounding [the] prior consistent statement," or where the alleged motive to lie does not appear to be very strong, then again the mere fact that the statement postdated the existence of the alleged motive to lie should not be determinative of admissibility. *United States v. Lawson*, 872 F.2d 179, 183 (6th Cir.), *cert. denied*, 493 U.S. 834 (1989).

The courts below applied these principles correctly in this case. As the Court of Appeals stated, the alleged motive to lie here was not "a particularly strong one." Pet. App. 19. The child's out-of-court statements that she had been sexually abused by her father were themselves quite probative; one of the statements was spontaneous, others were made to three separate pediatricians, who stated that the child had informed them about the abuse, and no serious allegation was made that these statements were the product of any "coaching." *Id.* at 19-20 & n.9. The allegations also appeared to be corroborated by physical evidence about the child's hymenal tissue and vaginal opening. *Id.* at 5. Finally, the allegations made by the defense would require the conclusion that a five-year-old child could engage in and execute a prolonged and "calculated scheme to deceive," which was viewed as rather implausible here. *Id.* at 19-20.

For all of these reasons, therefore, the courts below properly ruled that A.T.'s prior consistent statements were admissible in this case under Rules 801(d)(1)(B), 402, and 403.

III. THIS COURT HAS RECOGNIZED AND ACCOMMODATED THE SUBSTANTIAL PUBLIC INTEREST IN ENSURING THAT THE TESTIMONY OF CHILDREN WHO ARE VICTIMS OF CRIME CAN BE ADMITTED IN PROSECUTIONS OF THOSE WHO PERPETRATE SUCH CRIMES, AND THE SAME SUBSTANTIAL PUBLIC INTEREST SHOULD BE RECOGNIZED AND APPLIED IN THIS CASE.

The amici States also urge the Court to find A.T.'s prior consistent statements admissible in this case because the importance of ensuring effective testimony by children who are victims of crime is a factor that is germane to the determination of relevancy and admissibility in these circumstances.

The importance of this interest was recognized by this Court in *Maryland v. Craig*, 497 U.S. 836 (1990). In Justice O'Connor's opinion for the Court, it was held that the Confrontation Clause does not categorically prohibit a child witness in a child abuse case from testifying against a defendant at trial by one-way closed circuit television. In so holding, the Court did not simply engage in an abstract analysis of the Confrontation Clause, but leavened that analysis by considering the importance of the countervailing state interest "in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator." *Id.* at 852. This interest in "the protection of minor victims of sex crimes" was judged to be a compelling one, *id.*, given the State's "traditional and transcendant interest in protecting the welfare of children," *id.* at 855, quoting *Ginsberg v. New York*, 390 U.S. 629, 640 (1968). As the Court has summed up the matter: "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and

psychological well-being of a minor' is 'compelling.' " *Osborne v. Ohio*, 495 U.S. 103, 109 (1990), quoting *New York v. Ferber*, 458 U.S. 747, 756-57 (1982).

In *Craig*, moreover, this Court recognized that such a compelling state interest bore weight even against claims that constitutional rights were being infringed. As the Court squarely acknowledged, "'we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.'" *Id.* at 852, quoting *Ferber*, 458 U.S. at 757. Of course, no such claims of constitutional violations are even raised in this case, and thus an even stronger argument can be made for the relative importance of this factor in assessing the proper balance to be struck in determining the admissibility of A.T.'s prior consistent statements here.[5]

Finally, the amici States would stress that the "pre-motive" restriction which Petitioner seeks to read into Rule 801(d)(1)(B) could have a devastating effect on efforts to prosecute charges of sexually abusing a child. As this Court recognized in *Craig*, the serious difficulties of obtaining testimony from victims of child abuse, and of sexual abuse in particular, in the traumatic setting of a courtroom trial should not be minimized. Especially in the case of young children, spontaneous or otherwise reliable statements made outside the courtroom often can provide useful and quite probative evidence as to the actual facts of the case.

In the context of such cases, the defense will always be able to devise some alleged motive for the child to lie. In cases of abuse, it may well be simply that the child would prefer not to have contact with the defendant, which would certainly be expected in such cases, or perhaps that the child is alleged to desire

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[5] Although Petitioner raised constitutional claims below under the Confrontation Clause and the Due Process Clause, see Pet. App. 20-22, 23-25, no such claims have been presented to this Court.

attention. *See, e.g., State v. Robinson,* 611 A.2d 852 (Vt. 1992). Such alleged motives to lie, which may be weak motives at best or may have little or no obvious or recent origin, could readily permit the defense to remove any possibility that prior consistent statements made by the child victim -- no matter how probative the circumstances in which they were made -- could be admitted at trial. Such a result would plainly disserve the substantial state interest, recognized in many decisions of this Court, in protecting the physical and psychological well-being of children. Instead, the discretion to make such decisions should be vested in the trial court, where it is expressly placed under Rules 402 and 403, so that judges can make a reasoned determination about the admissibility of such statements in the context of the interests that are directly raised in particular cases. The approach adopted by the Court of Appeals in this case represents a sensitive and sound weighing of those interests in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Respondent, this Court should affirm the decision of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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